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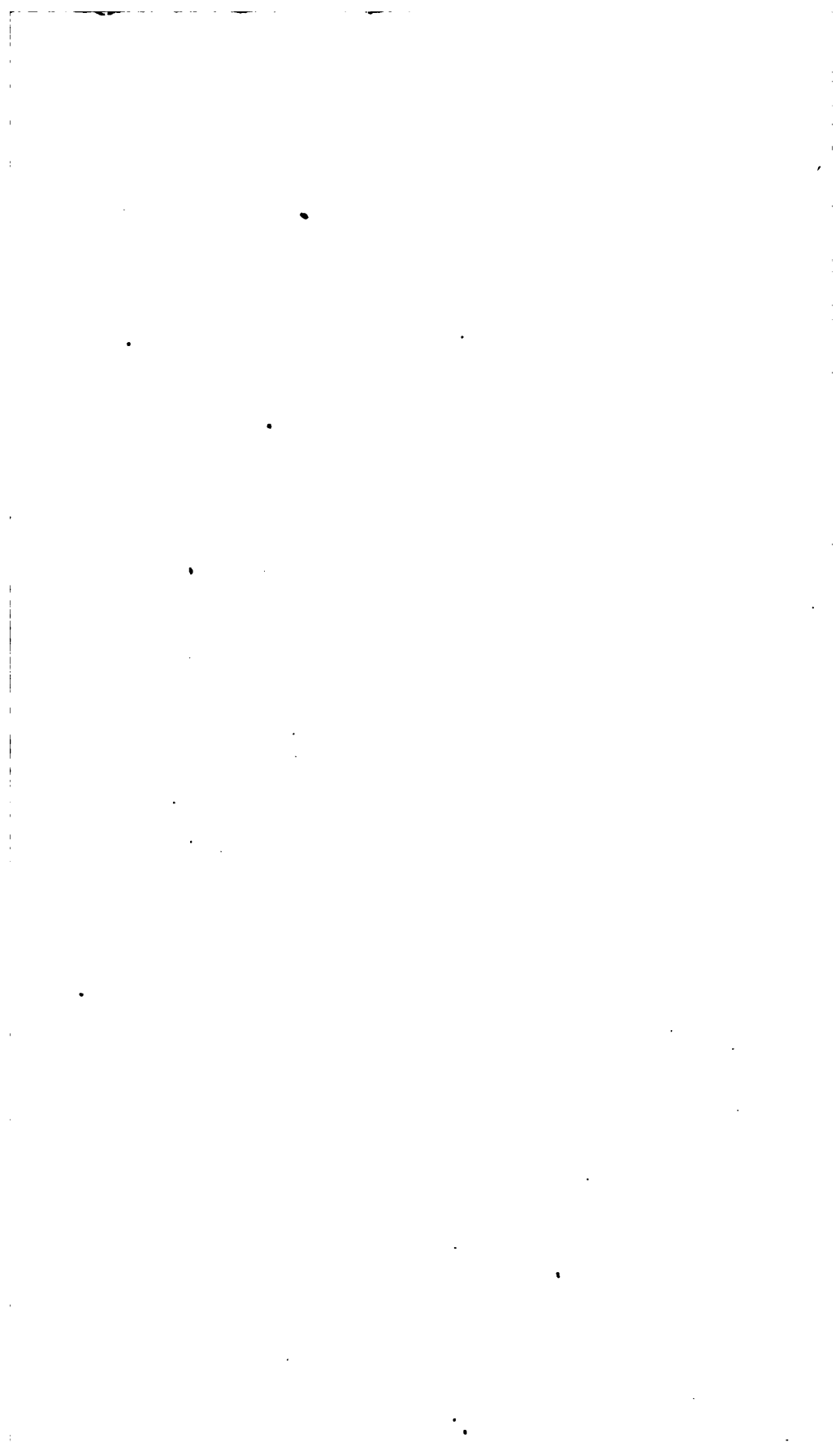
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LEADING CASES
ON THE
LAW OF TORTS

DETERMINED BY THE COURTS OF
AMERICA AND ENGLAND.

WITH NOTES.

BY
MELVILLE M. BIGELOW.

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SAN FRANCISCO, Cal.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1875.

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THE
HISTORY OF THE
UNITED STATES
OF AMERICA

TO

HENRY W. PAINE, LL.D.

P R E F A C E.

THE work now offered to the profession is the result of an attempt to furnish for ready service a collection of recognized authorities on the existing law of Torts, with a consideration of the rise and growth of the law as thus represented, followed by a statement in greater detail of its present aspect.

The author has confined himself to a consideration of the typical branches of the subject, omitting bailments, marine torts, statutory torts, and the torts of persons under legal disability. To introduce these with proper fulness would have required such a curtailment of the main branches of the subject as to destroy in a great measure the practical usefulness of the book. They were therefore omitted and reserved for future consideration, should it ever become desirable to add another volume to the work. It may be observed, however, that the topics mentioned are often incidentally presented, and their leading doctrines touched upon.

Even with these omissions, it was not possible to consider in detail all of the law relating to the main branches of the subject. Slander, Trespasses upon Property, and Negligence have each been treated in text-books as large as the present volume. As to these subjects, and as to one or two others, the author was governed by the same considerations as in deciding upon the omissions above mentioned. It was thought best to present the central and prominent features of these topics in full detail, leaving the rest for incidental mention and illustration.

In one word, it is the object of this book to present a full and complete view of the essential doctrines of the law of Torts. To this end, the notes will be found to contain many minute discussions of particular points in the law; especially of such as have

been the subject of conflict. If there has been any success in proportion to the amount of labor bestowed upon this attempt to bring out in clear relief the great doctrines of the subject, the work will have accomplished its chief purpose.

The author confesses to a partiality for that portion of his work which, in this swift age, will pass unnoticed by many of those into whose hands the book may chance to fall. The practicing lawyer of to-day has little time, and possibly less inclination, for historical study; and the old law, having lost much of its force as authority, is rapidly passing into oblivion. To acquire a knowledge of the crabbed books which were the only sources of authority to the lawyers of the olden time is now too great a sacrifice. The importunity of business forbids it; and the multitude of modern books, in their improved dress and English text of the day, renders it for most purposes unnecessary. May not the author hope that the difficulty of tracing the course of the old authorities upon *one* branch of law has now, to some extent, been relieved? And if so, may he not also indulge a well-grounded hope that he has done something to arrest the tendency to wholly brush aside the law of the past? This is in part the object of the historical notes.

But there is a growing class of persons devoted more or less to the *study* of the law, rather than to its practice; and for such the historical notes are especially intended.

The notes of which we speak are given as introductory to those on the existing law, but separate from them, so that no one may be led to suppose that the present law is referred to. They are prefixed to each of the subjects into which the book is divided, and will show how those subjects first took form in the English Courts, after the Norman Conquest, and their subsequent growth and development.

In carrying out the design of presenting a set of authorities ready for present use, the author hopes to have performed a useful service. Something more has been done than to present a considerable number of leading cases in the text. Many short reports of cases will be found in the notes. This feature in other books has met with wide approval, particularly among the great number of the profession who have not ready access to large libraries; and this is sufficient to justify the labor and care bestowed upon it here.

For the arrangement of the work, in its outline, the author is much indebted to the suggestions of Mr. Oliver Wendell Holmes, Jr. The valuable contribution of that gentleman on The Theory of Torts in the "American Law Review," for July, 1873 (7 Am. Law Rev. 652), has been studied, and the arrangement there elaborated has exercised a controlling influence on the one adopted in this book; the differences between the two being more of detail than of substance. The division of duties into the classes of persons upon whom they devolve and to whom they are owed has been omitted as too subtle for a book of leading cases; but the division of topics is substantially adopted. Mr. Holmes's chart will be found on p. 663 of the 7 Am. Law Rev., and may be compared with the following, which represents the order of subjects in this work: —

First class. — Deceit.

Slander and Libel.
Malicious Prosecution.
Conspiracy.

Second class. — Assault and Battery.

False Imprisonment.
Seduction and Enticing away.
Trespasses upon Property.
Conversion.
Nuisance.
Dangerous Animals and Works.
Obstructing and Diverting Water.
Support of Ground and Buildings.

Third class. — Negligence.

The present opportunity is taken to tender acknowledgments also to Mr. Green, Lecturer on Torts in the Boston University Law School, for many valuable criticisms and suggestions in the progress of the work; and to Dr. Wharton and Messrs. Shearman and Redfield, whose works on Negligence have been of service in the preparation of the last and largest topic of this volume.

M. M. B.

Boston, September 1, 1875.

ADDENDA.

On p. 113, near top of second column, add *Miller v. David*, Law R. 9 C. P. 118, as to special damage.

On p. 193, near top of first column, add, after "*Paullus*," lib. 1.

On p. 231, at end of the citations in the middle of first column, add *Commonwealth v. White*, 110 Mass. 407.

On p. 439, at the end of the citations in the middle of the second column, add *Perham v. Coney*, 117 Mass. 102; and, after the next citation (*Johnson v. Weedham*), add *Harvey v. Epes*, 12 Gratt. 153.

On p. 600, near top of first column, add, after "*Christie v. Griggs*, 2 Campb. 79," See also *Roberts v. Johnson*, 58 N. Y. 613.

On p. 721, at the end of the paragraph closing near the foot of the second column, add See *Carroll v. Staten Island R. Co.*, 58 N. Y. 126.

Add the following at the foot of p. 616, making a reference from the paragraph ending near the top of the first column: Further, it has never been objected to the liability of an agent or servant to third persons for misfeasance that the act was a breach of contract by him with his principal or master. See *Story, Agency*, §§ 308 *et seq.*; *Lane v. Cotton*, 12 Mod. 488; *Bell v. Josselyn*, 3 Gray, 309; *New York, &c., Tel. Co. v. Dryburg*, 35 Penn. St. 298, 303.

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LEADING CASES ON TORTS.

DECEIT.

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PASLEY v. FREEMAN.

(8 T. R. 51. King's Bench, England, Hilary Term, 1789.)

A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is benefited.

THIS was an action in the nature of a writ of deceit, to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: "And whereas, also, the said Joseph Freeman, afterwards, to wit, on the twenty-first day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully

encourage and persuade the said John Pasley and Edward to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of 2,634*l.* 16*s.* 1*d.* upon trust and credit; and did for that purpose then and there falsely, deceitfully, and fraudulently assert and affirm to the said John Pasley and Edward, that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect, and did thereby falsely, fraudulently, and deceitfully cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares, and merchandises upon trust and credit to the said John Christopher; and, in fact, they the said John Pasley and Edward, confiding in and giving credit to the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the twenty-eighth day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, and merchandises upon trust and credit to the said John Christopher; whereas in truth and fact, at the time of the said Joseph's making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of 2,634*l.* 16*s.* 1*d.* last mentioned, or any part thereof, for the said last-mentioned goods, wares, and merchandises; but, on the contrary, the said John Christopher then was and still is wholly unable to pay the said sum of money last mentioned, or any part thereof, to the said John and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation the said John Christopher was not a person safely to be trusted or given credit to in that respect as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward afore-

said; by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph, the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandises, and the value thereof, to wit, at London aforesaid, in the parish and ward aforesaid, to the damage, &c.

Application was first made for a new trial, which after argument was refused, and then this motion in arrest of judgment. *Wood* argued for the plaintiffs, and *Russell* for the defendant, in the last term; but as the court went so fully into this subject in giving their opinions, it is unnecessary to give the arguments at the bar.

The court took time to consider of this matter, and now delivered their opinions seriatim.

GROSE, J. Upon the face of this count in the declaration, no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood, by saying that Falch might be safely intrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent; but it is insisted that the law recognizes principles on which it may be supported. The principle upon which it is contended to lie is that, wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert, and shall endeavor to show that, in every case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must

be upon the ground that there exists in this case, what the law deems, *damnum cum injuria*. If it does, I admit that the action lies; and I admit that upon the verdict found the plaintiffs appear to have been damnified. But whether there has been *injuria*, a wrong, a tort, for which an action lies, is a matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. Deceit, pl. 29; and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true, which is misrepresented; and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time for a supposed injury, which has been daily committed for centuries past. For I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others; and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put. Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it, he discovers the defect, and sells the estate for less than he gave: why may not an action be brought for the loss upon any principle that will support this action? And yet such an action has never been attempted. Or suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and sure-footed, when in fact the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller, and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant.

And they will be in a better situation than they would have been if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he do not pay for the goods, I will;" for then undoubtedly an action would not have lain against the defendant. Other and stronger cases may be put of actions that must necessarily spring out of any principle, upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases, in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is where the affirmation is that the thing sold has not a defect which is a visible one; there the imposition, the fraudulent intent, is admitted, but it is no tort. The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion, such as the party deceived may exercise his own judgment upon; as where it is matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; Bayly v. Merrel. In Harvey v. Young, Yelv. 20, G. S., who had a term for years, affirmed to F. D. that the term was worth 150*l.* to be sold, upon which F. D. gave 150*l.*, and afterwards could not get more than 100*l.* for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage

in 1 Roll. Abr. 101, are recognized in 1 Sid. 146. How, then, are the cases? None exist in which such an action as the present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie; not even a *dictum*. But from the cases cited some principles may be extracted to show that it cannot be sustained: 1st. That what is fraud, which will support an action, is matter of law. 2d. That in every case of fraudulent misrepresentation, attended with damage, an action will not lie even between contracting parties. 3d. That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him credit; but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own, to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in *Yelverton* respecting the value of the term. But at any rate, it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this the plaintiffs might have inquired of others, who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly v. Merrel*. I am, therefore, of opinion that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

BULLER, J. The foundation of this action is fraud and deceit

in the defendant, and damage to the plaintiffs. And the question is, whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per Croke, J., 3 Bulst. 95. But it is contended that this was a bare, naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud; and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel, who originally made the motion, that no action could be maintained unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare, naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are Yelv. 20, Carth. 90, Salk. 210. The first of these has been fully stated by my brother Grose; but it is to be observed that the book does not affect to give the reasons on which the court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the court went on a distinction between the words "warranty" and "affirmation," the case is not law; for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended. But the true ground of that determination was that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and

which is often governed by whim and caprice. Judgment, or opinion, in such cases, implies no knowledge. And here this case differs materially from that in Yelverton: my brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in Yelverton admits that, if there had been fraud, it would have been otherwise. The case of *Crosse v. Gardner*, Carth. 90, was upon an affirmation that oxen which the defendant had in his possession, and sold to the plaintiff, were his, when in truth they belonged to another person. The objection against the action was that the declaration neither stated that the defendant deceitfully sold them, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. *Ex concessis* therefore if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But, notwithstanding these objections, the court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And, in Cro. Jac. 474, it was held that affirming them to be his, knowing them to be a stranger's, is the offence and cause of action. The case of *Medina v. Stoughton*, Salk. 210, in the point of decision, is the same as *Crosse v. Gardner*; but there is an *obiter dictum* of Holt, C. J., that where the seller of a personal thing is out of possession, it is otherwise; for there may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and, if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases, then, are so far from being authorities against the present action, that they show that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion, then, is not necessary to constitute fraud.

In the case of a conspiracy, there must be a collusion between two or more to support an indictment; but if one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney v. Selby*, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was 30*l.* per annum, when it was only 20*l.* per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated; nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And, by the words of the book, it seems that, if the tenant had said the same thing, he also would have been liable to an action. If so, that would be an answer to the objection that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the *dictum* or inference which may be collected from that case. If A., by fraud and deceit, cheat B. out of 1,000*l.*, it makes no difference to B. whether A. or any other person pockets that 1,000*l.* He has lost his money; and, if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and, upon that, B. buys them, when in truth they are the goods of another, yet, if he sell them, fraudulently and falsely, on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them, knowing them to be the goods of the stranger, yet B. shall have an action for this deceit. It is not clear from this case whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person: what is said at the end of the case only proves that “falsely” and “fraudulently” are equivalent to

"knowingly." If the first were the fact in the case, namely, that he had no authority, the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For, in 1 Roll. Abr. 100, pl. 1, it was held, that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name of my land, this shall bind me for ever; and, therefore, I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognizance, statute-merchant or staple, there is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to whom it was so acknowledged. If that had been necessary, it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Roll. Abr. 95, l. 25, it is said, "If my servant lease my land to another for years, reserving a rent for me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances, if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty." Here, then, is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425; but no notice is taken of this point, probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration that, if there were any fraud, the nature of it is not stated. To this the declaration itself is so direct an answer, that the case admits of no other. The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here, then, is the fraud and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is neces-

sary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so: by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for if a man who is asked a question respecting another's responsibility hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbor, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of *Coggs v. Barnard*, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall.

In *R. v. Gunston*, 1 Str. 589, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the court refused to grant a *certiorari*, unless a special ground were laid for it. If the assertion in that case had been wholly innocent, the court would not have hesitated a moment. How, indeed, an indictment could be maintained for that I do not well understand; nor have I learnt what became of it. The objection to the indictment is that it was merely a private injury; but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, even though it be under the specious pretence of serving his friend, I say *ausis talibus istis non jura subserviunt*.

ASHHURST, J. The objection in this case, which is to the third count in the declaration, is that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in *Bayly v. Merrel*, 3 Bulstr. 95, is a sound and solid principle, namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power, namely, by weighing the goods; and therefore it was a foolish credulity, against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true; but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had been before this event subsisted a partnership between him and Falch, which had been dissolved; but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action, as in *Risney v. Selby*, which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to

sell to him. But it was argued that the action lies not, unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position; but if there were any such to be found, I should not hesitate to say that it could not be law, for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it: what is it to the plaintiff whether the defendant was or was not to gain by it? the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that if this be determined to be law, any man may have an action brought against him for telling a lie, by the crediting of which another happens eventually to be injured. But this consequence by no means follows; for in order to make it actionable it must be accompanied with the circumstances averred in this count, namely, that the defendant, "intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances I should clearly hold to be the subject of an action; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon; for the *quo animo* is a great part of the gist of the action. Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as

competent to courts of justice to apply the principle to any case which may arise two centuries hence, as it was two centuries ago ; if it were not, we ought to blot out of our law-books one fourth part of the cases that are to be found in them. The same objection might in my opinion have been made with much greater reason in the case of *Coggs v. Barnard* ; for there the defendant, so far from meaning an injury, meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And indeed the principle of the case does not in my opinion seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore I think the rule for arresting the judgment ought to be discharged.

LORD KENYON, C. J. I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All laws stand on the best and broadest basis which go to enforce moral and social duties. Though, indeed, it is not every moral and social duty the neglect of which is the ground of an action. For there are, which are called in the civil law, duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord Ch. B. Comyns,¹ that "an action upon the case for a deceit lies when a man does any deceit to the damage of another." He has not, indeed, cited any authority for his opinion ; but his opinion alone is of great authority, since he was considered by his contemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases on this subject. In 3 Bulstr. 95, it was held by Croke, J., that "fraud without damage, or damage without fraud, gives no cause of action ; but where these two do

¹ Com. Dig. tit. "Action upon the case for a deceit," A. 1.

concur, there an action lieth." It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. Dodderidge, J., said: "If we shall give way to this, then every carrier would have an action upon the case; but he shall not have any action for this, because it is merely his own default that he did not weigh it." Undoubtedly, where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence. And, in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the court held that the action was not maintainable. Then, how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them; and the law of morality ought to induce them to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's credit but by an application to his neighbors. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For a person does not have recourse to common conversation to know the title of an estate which he is about to purchase; but he may inspect the title-deeds; and he does not use common prudence if he rely on any other security. In the case of Bulstrode, the court seemed to consider that *damnum* and *injuria* are the grounds of this action; and they all admitted that, if they had existed in that case, the action would have lain there; for the rest of the judges did not controvert the opinion of Croke, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie; but that proposition is to be taken *sub modo*. If, indeed, no injury is occasioned by the lie, it is not actionable; but if it be attended with a damage, it then becomes the subject of an action. As calling a woman a whore, if she sustain no damage by it, is not actionable; but if she lose her marriage by it, then she may recover satisfaction in damages. But

in this case the two grounds of the action concur: here are both the *damnum et injuria*. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false assertion which is stated on the record, by which they sustained a considerable damage. Then, can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then, as to the loss: this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly *fraudulenter*, did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral and detrimental to society. And I am of opinion that the action is maintainable on the grounds of deceit in the defendant, and injury and loss to the plaintiffs.

Rule for arresting the judgment discharged.

Historical. — The history of actions of deceit runs back to an early period in the English law. Many writs (and writs were precedents while pleadings were oral) of deceit are given in the Register, both original and judicial (Original Writs, pp. 112 *et seq.*; Judicial Writs, pp. 6 b, 9 b, 10, 18, 37, 51 b, 52, 59 b, 65 b, 66, 70 b, 77 b); and this, we need hardly say, is one of the oldest authorities in our law. But we are not to place too much reliance upon Lord Coke's statement that the Register antedates the Conquest (A. D. 1066). Pref. 10 Rep. p. xxiv; 4 Inst. 140; Dugdale's Orig. p. 56. The improbability of this was long since shown by Hickes. See his Thesaurus, *Dissertatio Epist.* p. 8. Much of the Register is quite modern.

Now, the writ of deceit in its perfect form, as seen in the Register, was, it might be surmised, an evolution from something already in existence; and of this we find strong confirmation. Sev-

eral of the writs of deceit in the Register (as above cited) are actions for the recovery of lands adjudged to another in a real action through the fraud of the demandant, or of his sheriffs or officers; such, for instance, as the false return of the summoners, that the tenant (now plaintiff) had been summoned. The same proceeding is described in Bracton, who wrote about the middle of the 13th century; and the writ is given by him in full. It was as follows: —

“Rex vicecomiti salutem. Præcipimus tibi quod habeas eoram justitiariis nostris etc. talem petentem, scilicet, ad audiendum judicium suum et considerationem curiæ nostræ de hoc, quod ipse per malitiam et manifestam falsitatem fecit disseysiri talem de tanta terra cum pertinentiis, etc. Et unde cum idem B. nullam haberet summonitionem optulit se idem A. (i. e. petens, the former plaintiff) versus eum, ita quod terra capta fuit in manum nostram semel et secundo et per quam defaltem idem A.

terram illam recuperavit desicut illa defalta nulla fuit ut dicit; et catella ipsius B. in eadem terra tunc inventa et ei occasione prædicta oblata eidem sine dilatione reddi facias et restitui. Præcipimus etiam tibi quod habeas coram etc., ad eundem terminum, A. et B. per quos summonitio prima facta fuit et in curia nostra testata, et præterea quatuor illos per quorum visum terra illa capta fuit in manum nostram, et per quos captio illa testificata fuit in curia nostra etc. et etiam illos per quos secunda summonitio facta fuit et testata ad testificandum justiciarios nostros de prædictis summonitionibus et captionibus. Et habeas ibi hoc breve. Teste, etc." Bracton, 335 b.

The summoners and the four knights were then to be examined as to the truth of the complaint; and, if they were all agreed that summons had been duly made, the defence was to take place by law-wager; but, if they did not agree on the examination, the former judgment was to be annulled, and possession restored to the plaintiff in the writ. And if it should appear that the plaintiff was in fault, he was to be amerced. Ib. 336, 367.

If the above writ from Bracton be compared with the judicial writ of the Register, 6 b (part 2), it will be found that the only difference is that the latter sets out an actual case, with description of parties, tenements, &c., and that the wrong is alleged to be "in deceit of our court." It is clear that it is only a more perfect development of the writ of Bracton.

The same form of proceeding is described by Fleta, who wrote about a quarter of a century, or a little more, after Bracton (near the close of the 13th century). Fleta only gives the substance of the writ; and this, as

usual, in the language of Bracton. Lib. 6, c. 6. § 19, p. 380. But elsewhere (lib. 2, c. 1, § 13, p. 64) he speaks of the punishment of "deceivers of the king's court and the party," using the words contained in writs of deceit of the Register; which indicates that the writ had now assumed its settled form.

The above is the only writ given by Bracton which can be considered as the prototype of the writ of deceit. But he mentions elsewhere another *action* which was clearly a case of deceit. In speaking of pleas to writs in general, he says that a writ fails when it is obtained by false suggestion or suppression of the truth; "and at the same time an action to the damage of [i. e. against] the party who obtained it is given." Lib. 5, c. 17, § 2, p. 414. And he gives as an example of the former the case of one who represents himself to be an heir when he is not, — a point which had been decided in the fourth year of King Henry (2d?), Trinity term. A writ of this kind is given at length in the Register, pp. 114 b, 115; and this writ also runs "in deceit of our court."

In Glanville, who wrote about seventy-five years before Bracton, we find a writ, apparently at the instance of the crown, against one who had falsely essoined the tenant in a real action. The writ was as follows: "The king to the sheriff, greeting, — I command you that without delay you diligently seek through your county A., who has falsely essoined B. against C. in my court, and that you safely keep him until you have my other precept. Witness, &c."

Compare with this the writs of the Register against false essoiners, and it will be clear that they are developed

from the writ in Glanville. Register, 116; Fitzherbert's *Natura Brevium*, 96 B.; *infra*, p. 19, where we give at length a writ in deceit of the court and the plaintiff, in which the latter had sued a *præcipe quod reddat* against divers tenants, who purchased a protection for (*i.e.*, essoined) one of them, falsely affirming that he was beyond sea, in the king's service, whereby the demandant was delayed in his suit. And see a case of this kind, 20 Hen. 6, p. 10.

Within two or three years after Fleta wrote, we find mention of a writ of deceit *eo nomine*, in the Year-Book of 21 Edw. 1, p. 44, Horwood; being A. D. 1493. This is the first regularly reported case on the subject. The plaintiff had recovered judgment against another in debt, and had directed the sheriff to levy on certain corn of the defendant. The sheriff returned *nulla bona*; whereupon the plaintiff sued out a writ of deceit. He, however, failed in his proof (by the refusal of the court to allow his attorney to testify because he was *not* a party to the action), and he was amerced. The form of this writ is not given; but it is stated that it ran "in deceit of the court."

It may not be certain that this was not a new writ. The Statute of Westminster 2, c. 24, had been passed about eight years before (and about five years before Fleta was written), which authorized the clerks in chancery to form writs *in consimili casu* to those already in existence, where the plaintiff was justly entitled to a remedy, but could not bring his case within any of the existing writs. And it is *possible* that this writ against the sheriff was formed under the authority of this act; but

there is nothing to indicate that the action was new. And the presence of the words quoted indicates pretty strongly that it was not. An act done "in deceit of the court and a party" was a crime as well as a civil injury; the law imposing a year's imprisonment upon the offender. Fleta, lib. 2, c. 1, § 13, p. 64. And as the dignity and usefulness of courts could not be maintained if such acts were allowed, it is not probable that this punishment was any new thing. Now civil redress was often given in criminal actions in these early, and even in later times (see the notes on Assault and Battery, Trespasses upon Property, and Conversion); and we therefore conclude that writs against the sheriff for a false return probably antedated the statute. It may be observed, also, that the writ in the case referred to was a *judicial* writ; and Bracton (who wrote before the Statute of Westminster) says that such writs were frequently varied according to the variety of pleas. Lib. 5, c. 17, § 2, p. 413 b. So, it would not follow that because actions against the sheriff for a false return *may* have been later than the other writs of deceit above referred to, they must have been founded on the statute.

But, however this may be, it is clear that the typical writ of deceit of the old law was one of the above class, in which the wrong was alleged to be in deceit of the court; and that such writs were in use, though not in their fully developed form, long before the statute under which actions on the case arose.¹ The necessities of the proper administration of justice, as well as the in-

¹ There are also several writs of deceit in the Register against counterfeiters of private seals, which probably sprung from the criminal prosecution for the *crimen falsi*, and may have preceded the statute. 112 b, 114 b, 116 b. See Bracton, 118 b, 119 b, 413 b; Fleta, 82.

jured rights of the complaining party, required them.

We give now the form in full of two of the shorter of these typical writs of the Register, presenting them in Fitzherbert's translation. The first was directed against one who had fraudulently obtained a writ in the name of another:—

"The king to the sheriff of L. greeting, — If A. shall make you secure, &c., then put, &c., P., &c., as well to answer us as the aforesaid A., wherefore he fraudulently and maliciously, in our Court of Chancery, obtained our certain writ by a fine of twenty shillings, taken for our use, for the writ aforesaid, in the name of the aforesaid A., who was wholly ignorant of this, in deceit of our court, to the great damage of the said A. And have you there the names of the pledges and this writ, &c." *Natura Brevium*, p. 96 A.

The next was against tenants who had purchased a false protection. "If A. shall make you secure, &c., then put B. and C., &c., that they be before, &c., as well to answer us as A.; wherefore, whereas he, the said A., in our court, before our justices of the bench, impleaded by our writ the aforesaid B. and C. of three parts of the manor of S., with the appurtenances, they, the said B. and C., manifestly contriving to evade our court and the law and custom of our realm of England, and to delay the prosecution of the aforesaid A. in this behalf, at a certain day prefixed to the said parties in the same plea before the said justices, caused to be produced before the said justices our certain letters of protection, comprizing that he, the said C., was then gone into parts beyond the seas, in our service, and so he was to be quiet touching all pleas and complaints, except pleas *unde nihil*, &c., and except pleas

in which he might happen to be summoned before our justices in eyre in their circuits, he, the said C., being then, afterwards, and before that time, continually residing in England, by which that plea before the said justices remained without day, in manifest contempt of us, and in deceit and manifest evasion of our court aforesaid, and of the laws and custom aforesaid, and also to the great expense and manifest danger of disherism of him, the said A. And have there," &c. *Nat. Brev.* 97 B.

The interesting fact in the history of this writ remains to be mentioned; namely, that the writ of deceit was taken as a model in framing new remedies under the St. of Westm. 2. We are wont to suppose that trespass was the universal model, as in our day trespass on the case, and its offspring *assumpsit*, are alone in use, even deceit having lost in the former its individuality. But there *was* a time, a period of at least a century and a half, after the above statute when the writ of deceit was used as a model for new writs; and during this period we have frequent mention of writs of deceit on the case, *eo nomine*. Year Book, 9 Hen. 6, p. 53, pl. 37; s. c. *post*, p. 34; 16 Edw. 4, p. 9; Old *Natura Brevium*, p. 58 (ed. 1528).

The first of these cases was an action for fraud in the sale of wine; the liquor proving to be sour and unfit to drink. The second was an action for the failure of the defendant to properly perform an agreement to enfeoff the plaintiff; the defendant having, after his promise enfeoffed another (see *infra*). And in the Old *Natura Brevium*, as cited, it is stated that if, after a writ of deceit granted to a tenant, who has lost seizin of his land by judgment without summons, against the demandant and summoners, the summoners die before

they are examined of the alleged deceit, the tenant shall never recover the land (since they alone could give evidence that summons was made); but the tenant shall then have a writ of deceit upon his case against the sheriff, and recover against him all his damages.

That the above cases of actions for fraud in contracts were not at first considered proper subjects for trespass on the case, and that that action was considered as distinct from deceit on the case, is clear from several cases. Thus, in one action the plaintiff declared in trespass on the case that the defendant had sold to him a horse, warranting him sound, knowing that he was full of maladies in his eyes and legs. To which the court said: "This writ supposes a false and fraudulent sale, which sounds in deceit." *Bellewe, Cas. t. Rich. 2, p. 139.*

But trespass on the case soon began to encroach upon deceit. In the reign of Henry 6, the former came to be used, where the latter had been, against an escheator for a false return: 9 Hen. 6, p. 60; and in some cases the distinction between the two writs was very nice. Mr. Reeves mentions the following distinction as taken in a case in the Year Book of 20 Hen. 6, p. 34: Where a person made a promise to do anything and broke that promise, trespass on the case lay; but if he performed it nominally, but by some false dealing rendered the performance of no effect, deceit lay. As if a man who had undertaken to enfeoff another, first charged the land or enfeoffed a stranger, and then entered and made the feoffment which he had promised to make, this was a case for the writ of deceit. 2 Reeves's Hist. Eng. Law, 606, Finl. ed. See also 16 Edw. 4, p. 9; 3 Hen. 7, p. 14.

The subsequent history of this ancient writ is shortly told. So far as it lay

for the recovery of lands obtained under a void judgment operating as an *audita querela* for setting aside the judgment, it was abolished by statute in the reign of William 4th. 3 & 4 Wm. 4, c. 27. So far as it was used as an action for the breach of a parol contract, it was gradually superseded in practice by *assumpsit*; and in all other cases it finally lost its individuality, — so far as that consisted in giving it an existence of its own, distinct from other actions, — in the sweeping advance of trespass on the case. The name is still retained; but for a century or more that has been used to indicate the nature of the subject-matter rather than a peculiar form of action. Deceit has been fused with the younger and more vigorous action of trespass on the case, or rather has become one of its species.

Knowledge of Falsity. — Generally speaking, an honest statement of fact, though made with a view to being acted upon, and justifying action upon it in the light of ordinary transactions, will not, upon turning out to be untrue, create a liability for damages on the part of the person making it. Knowledge of the falsity of the statement must be fixed upon the defendant. *Collins v. Evans*, 5 Q. B. 820, 826; *Ormrod v. Huth*, 14 Mees. & W. 651, 664; *Behn v. Kemble*, 7 C. B. N. s. 260; *Barley v. Walford*, 9 Q. B. 197, 208; *Thom v. Bigland*, 8 Ex. 725; *Childers v. Wooler*, 2 El. & E. 287; *Mahurin v. Harding*, 28 N. H. 128; *Evertson v. Miles*, 6 Johns. 138; *Case v. Boughton*, 11 Wend. 106, 108; *Carley v. Wilkins*, 6 Barb. 567; *Edick v. Crim*, 10 Barb. 445. Though the contrary was at one time supposed to be law. *Fuller v. Wilson*, 3 Q. B. 58; *ib.* 1009; *Evans v. Collins*, 5 Q. B. 805, *revd.* 820.

The well-known case of *Cornfoot v.*

Fowke, 6 Mees. & W. 358, though an action of contract, is generally referred to in this connection. A statement had been made by an agent which was false to the knowledge of the principal, but not to the knowledge of the agent; and there was nothing to show that the principal had authorized the statement, or that he knew it had been made. These facts were held insufficient to support the defence of fraud. The case has often been discussed and criticised; but whatever may be said of its soundness as a defence to an action in contract (see the dissenting opinion of Lord Abinger, C. B.), had it been an action in tort for the false statement, its correctness could hardly be doubted.

But the honesty of the statement is not always a good answer to an action of deceit. A distinction between moral, or actual, and legal, or constructive, fraud has been taken in many of the cases, and particularly in *Haycraft v. Creasy*, 2 East, 92, and in *Taylor v. Ashton*, 11 Mees. & W. 401. (It is proper to remark that the term "fraud," as used in this connection, means merely knowledge of the falsity of the representation; though in its proper sense it means not only this, but, in addition, an intent to injure.)

In *Haycraft v. Creasy*, Lord Kenyon thought that for the defendant to have stated a fact as of his own positive knowledge, of which, in truth, he possessed no knowledge, was legal, as opposed to actual, fraud, and, other elements concurring, was sufficient to sustain an action in tort. The majority of the court were against him, though on the ground that the facts upon which the representation was made were mere matter of opinion. Had not this been the case, the position of Lord Kenyon would clearly have been correct. Such

a representation implies that the party claims to have positive evidence of the fact stated, amounting to proof; and if he had no evidence of the fact at all, he has plainly told what he knows to be false. He has not made a mistake; he has told a lie. Whereas, if he had made the very same statement upon some knowledge, actual or supposed, which had turned out erroneous or had given rise to wrong deductions, he could well be permitted to prove his honesty.

Mr. Justice Maule, in *Evans v. Edmonds*, 13 C. B. 777, 786, says that in such cases a party takes upon himself to warrant his own belief of the truth of that which he asserts. And many other expressions to the same effect may be found in the books. See *Smout v. Ilbery*, 10 Mees. & W. 1; *Jenkins v. Hutchinson*, 13 Q. B. 748; *Randell v. Trimen*, 18 C. B. 786; *Pawson v. Watson*, 2 Cowp. 788; *Pulsford v. Richards*, 17 Beav. 87, 94; *Milne v. Marwood*, 24 Law J. C. P. 36, 37; *Western Bank v. Addie*, Law R. 1 Scotch, 145; *Reese Silver Mining Co. v. Smith*, Law R. 4 H. L. 64; *Lobdell v. Baker*, 1 Met. 193, 201; *Bennett v. Judson*, 21 N. Y. 138; 1 Story, Eq. Jur. § 193.

So, too, a person is often held liable for misrepresentations of fact, though not made with actual fraud, where the facts are such as are peculiarly within his own knowledge. See the remarks of Cresswell, J., and Wilde, C. J., in *Jarrett v. Kennedy*, 6 C. B. 319, 322.

The case of *Taylor v. Ashton*, 11 Mees. & W. 401, may be explained upon this ground. That was an action on the case for misrepresentations in certain reports put forth by the defendants to induce parties to become shareholders in a banking enterprise; the reports falsely exhibiting the enterprise to be in a prosperous condition. It was

held that it was not necessary to show that the defendants knew that the representations were false. The facts were peculiarly within their own knowledge.

Under this class of cases may also be included cases of express and implied representations of agency. Indeed, it is in cases of this kind that the doctrine under consideration has been most often asserted. It is settled law that if a person honestly assume to act for another in respect of a matter over which he has no authority, he renders himself liable to an action; the action being sometimes said to be for the breach of an implied warranty of authority, and in others for a false representation. See *Collen v. Wright*, 8 El. & B. 647; *Randell v. Trimen*, 18 C. B. 786; *Cherry v. Colonial Bank*, Law R. 3 P. C. 24; *Pow v. Davis*, 1 Best & S. 290; *Spedding v. Nevell*, Law R. 4 C. P. 212; *Godwin v. Francis*, Law R. 5 C. P. 295; *Richardson v. Williamson*, Law R. 6 Q. B. 276; *White v. Madison*, 26 N. Y. 117, 124; *Jefts v. York*, 4 Cush. 371; *Bartlett v. Tucker*, 104 Mass. 336; *Johnson v. Smith*, 21 Conn. 627; *Noyes v. Loring*, 55 Maine, 408; *McCurdy v. Rogers*, 21 Wis. 197, 202. (*Assumpsit* for breach of warranty, it is to be observed, is often a concurrent remedy with deceit; and in that form of action the allegation of a *scienter* is of course unnecessary. See *Mahurin v. Harding*, 28 N. H. 128.)

That these cases are to be sustained, if at all, upon the principle that the facts are peculiarly within the knowledge of the professed agent, finds support in the remarks of Jervis, C. J., in the course of the argument in *Randell v. Trimen*, *supra*. The report runs thus: *Counsel for the defendant*. "There is no pretence, upon the evidence, for

saying that the defendant wilfully misrepresented his authority." JERVIS, C. J. "The defendant is clearly liable for his misrepresentation as to his being authorized to order the stone in the name of the Rev. Mr. Ireland." *Counsel*. "Even though he were honestly mistaken?" JERVIS, C. J. "Yes." *Counsel*. "That, it is submitted, is contrary to the doctrine laid down by the Court of Exchequer in *Smout v. Ilbery*, 10 Mees. & W. 1." JERVIS, C. J. "In that case there was no representation at all by the defendant. The plaintiff was misled by a circumstance *equally within the knowledge and beyond the control of both parties*." And this is one of the grounds upon which the court in *Smout v. Ilbery* rest their decision. That was an action of debt against a married woman for meat supplied. It appeared that the husband, having been in the habit of dealing with the defendant, went abroad, leaving his wife and family behind, and there died. And it was held that she was not liable for meat supplied before information of her husband's death was received.

Other cases of the same character will be readily suggested; as where the agency of a party is determined by a dissolution of the partnership of the principals residing in a distant place, the fact being unknown to the defendant (the professed agent) at the time of the transaction in controversy; or where a foreign agency is suspended or terminated by a declaration of war against the country in which the agent resides. In such cases, the facts not being more within the knowledge of the defendant than of the plaintiff, this action cannot be maintained.

The result of the cases upon this point we understand to be this: The representation complained of must be

proved to have been made with actual knowledge of its falsity; unless (1) it be made of the party's own positive knowledge when he knows nothing at all about it; or unless (2) it be made of a fact peculiarly within his knowledge, i.e., his means of knowledge, and not so within the plaintiff's. But if the statement amount only to an expression of opinion, no right of action will arise. *A fortiori*, if the plaintiff knew the truth, he cannot maintain the action, since he has not been deceived.

There is another case which should be mentioned as being somewhat related to this subject. It is this: that where an action is brought against a party who is bound to indemnify the plaintiff for an act done by the defendant's authority upon a false representation made by him, — as in the case of an action by a sheriff against an attorney who has required him to levy upon certain goods as the property of a judgment debtor when they were not his property, or to take the body of such a person as the one designated in the writ, when he was not the person, — in these cases it is not necessary for the plaintiff to prove that the defendant knew that his statement was false. *Humphries v. Pratt*, 5 Bligh, N. S. 154; *Collins v. Evans*, 5 Q. B. 820. In such cases the action in reality is for indemnification over, and not, properly speaking, for deceit.

In the further consideration of the *scienter* it remains to consider the effect upon an innocent principal of the fraudulent representations of his agent.¹ If the principal authorized the statement, the same rule will prevail as if he had made it himself. *Infra*, p. 33. But while this is clear, few points in the law have

been the subject of more perplexing doubts and conflicts than the question of the liability in tort of a principal for such misrepresentations of his agent as are known by the agent to be false, but not by the principal. In America it has generally been held that an action of deceit may be maintained against the principal; but the cases are at variance as to the ground of liability. In England the whole subject has until recently been in a very unsettled state; and it is not yet free from difficulties.

The American courts in most cases have implicitly followed the doctrine of *Hern v. Nichols*, 1 Salk. 289, but generally with little or no investigation of the proper limitations of that case. This is somewhat remarkable, as *Hern v. Nichols* is but a briefly reported *nisi prius* decision. The case was this: The plaintiff, in an action of deceit, set forth that he had bought several pieces of silk for — silk, whereas it was another kind of silk, and that the defendant, well knowing this deceit, sold it to him for — silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was his factor beyond sea; and the doubt was, if this deceit could charge the merchant. And Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger. And upon this opinion the plaintiff had a verdict.

Among the American cases, Jeffrey

¹ The author published the substance of the following consideration of the misrepresentations of agents as an article in the "American Law Review," of July, 1874. 8 Am. Law Rev. 631.

v. Bigelow, 13 Wend. 518, is often referred to. The facts in this case, in brief, were that one Stevens, an agent of the defendants, had sold to the plaintiff sheep infected with the scab, which fact was at the time known to the agent, but not to the defendants. The fact of the disease was known to one Hunt, who at the sale was a partner of the defendants, to whom he had before the action assigned all his interest. In an action on the case for fraud the defendants were held liable, both for the loss of the sheep sold by their agent, and of others that had become infected by them. Much was said in the opinion of the court to the effect that, Hunt being a partner, his knowledge was notice to his copartners, the defendants; also that Stevens was a general agent in relation to the sale; and the doctrine of Lord Holt, *supra*, of trust and confidence reposed in the agent, was adopted. Hunt's connection with the case does not appear to be important; for as partner he was only a general agent of the firm, and there was no evidence that he had in fact communicated his information to the defendants.

The leading case in Massachusetts is *Locke v. Stearns*, 1 Met. 560. This was trespass upon the case in the nature of deceit. One of the defendants, who were partners, had sold divers quantities of meal as linseed meal, when in fact it was a mixture of linseed and teilseed meal; the latter being inferior in quality to the former. The judge charged the jury that if one of the defendants sold the meal to the plaintiff, knowing that teilseed meal was inferior in quality and value to linseed meal, this knowledge would bind all the defendants; and the charge was sustained. After mentioning that the de-

ceit was resorted to for the defendants' benefit, the ground taken in *Hern v. Nichols* was again referred to with approval. And it was also said to be a general rule that one partner is liable for damages sustained by the deceit or other fraudulent act of his copartner, done within the scope of his authority; citing *Rapp v. Latham*, 2 Barn. & Ald. 795, and *Willet v. Chambers*, 2 Cowp. 814.

The case of *Bennett v. Judson*, 21 N. Y. 238, though holding a similar doctrine, marks a departure from the above cases in the ground of liability. That was an action for fraud in the sale of land by the defendant's agent. "There is no evidence," said Comstock, C. J., delivering the judgment of the court, "that the defendant authorized or knew of the alleged fraud committed by his agent Davis in negotiating the exchange of lands. Nevertheless, he cannot enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing he cannot claim immunity on the ground that the fraud was committed by his agent, and not by himself."

This ground, as we have stated, was suggested in *Locke v. Stearns*, *supra*; and had it not been for the ruling that the defendant in *Jeffrey v. Bigelow*, *supra*, was liable for the loss of other sheep than those sold by him, that case would also have been covered by the rule in *Bennett v. Judson*. A rule similar to that in *Jeffrey v. Bigelow*, in not confining the liability of the prin-

principal to the profit derived by him, was declared in *White v. Sawyer*, 16 Gray, 586. "No question is made by the defendant's counsel," said the court, "of the correctness of the doctrine that a principal is liable for the false representations of his agent, although personally innocent of the fraud. It is settled by the clear weight of authority." The point was therefore not considered in the case. And the same is true, so far as appears from the opinion, of the other point, extending the damages beyond the profit derived.

All of the other American cases are like *Judson v. Bennett*; the defendant being held liable where he has received a benefit from the act of his agent. In none of them is it suggested that his liability is to be pushed beyond this point. See *Allerton v. Allerton*, 50 N. Y. 670; *Craig v. Ward*, 3 Keyes, 393; *Elwell v. Chamberlin*, 31 N. Y. 619; *Chester v. Dickerson*, 52 Barb. 349; *Graves v. Spier*, 58 Barb. 387; *Hunter v. Hudson River Iron Co.*, 20 Barb. 493; *Sharp v. New York*, 40 Barb. 257; *Davis v. Bemis*, 40 N. Y. 453, note; *Durst v. Burton*, 2 Lans. 137; s. c. 47 N. Y. 167; *Sandford v. Handy*, 23 Wend. 260. In *Cook v. Castner*, 9 Cush. 266, the action was in assumpsit to recover the consideration paid in a transaction brought about by the fraudulent representations of one of the defendants, who were partners. Here, of course, the measure of damages is plain; and this is doubtless the proper form of action for such cases.

But while most of these cases were decided upon the ground taken in *Judson v. Bennett*, some of them also refer to the doctrine of *Hern v. Nichols*. See *Davis v. Bemis* and *Sandford v. Handy*, *supra*. Mr. Justice Nelson, in *Sandford v. Handy*, after quoting the

language of Lord Holt, says that the agent is "held out as fit to be trusted, and his fidelity and good conduct in the matter thereby recommended. Attorney-General v. Siddon, 1 Tyrwh. 46, Bayley, B.; Smith's Mer. Law, 70; Story's Comm. Agency, § 465. And where one of two innocent persons must suffer by the fraudulent act of a third, the one who enables such third person to commit the fraud must bear the loss." The first part of this language seems to be only another way of putting the doctrine of *Hern v. Nichols*. The trust and confidence reposed in the agent is manifested by holding him out as such.

Let us now turn to the English cases. The question has there more frequently arisen as to the liability of corporations for misrepresentations of their directors or other managers. In *Dodgson's Case*, 3 De Gex & S. 85, the plaintiff had been induced to purchase shares in a failing concern by the fraud of the directors, and brought suit in equity to have his name taken off the list of contributories in winding-up proceedings. But the Vice-Chancellor held that the fraud of the directors could not affect the general body of shareholders, *i.e.*, the company. This case was followed by Vice-Chancellor Parker, in *Bernard's Case*, 5 De Gex & S. 289, who there said: "Dodgson's Case shows that the directors cannot be the agents of the company to commit a fraud; and, therefore, even if Mr. Bernard had been induced to take shares by the misrepresentation of the directors, that was no reason why he should not be a contributory." In *Brockwell's Case*, 4 Drewry, 205, Vice-Chancellor Kindersley held the contrary on similar facts; but this case was soon after overruled by the Lord

Chancellor and Lords Justices in appeal. *Mixer's Case*, 4 De Gex & J. 575. "Clearly," said the Lord Chancellor, "there was fraud, and gross fraud, on the part of the directors, and I have no doubt that Mixer was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors which cannot be attributed to the company."

These, being cases of rescission, are, it is true, explainable on the ground of laches and change of position, or participation in the profits of the corporation or company. In *Dodgson's Case* the shares were purchased in 1846, and the claim to be relieved was not made until in 1849, though the plaintiff had received no dividends. In *Bernard's Case*, the complainant had received dividends on his shares for several years. In *Mixer's Case* the Lord Chancellor said: "Supposing it to have been a fraud on the part of the company, I do not think that the appellant is now entitled to avail himself of it and rescind the contract. [See *Parbury's Case*, 3 De Gex & S. 48]. It is a settled rule that a contract obtained by fraud is not void, but that the party defrauded has a right to avoid it if he does so while matters can be replaced in their former position. In each case we must look to see whether the contract has been acted upon. If it has been acted upon by the party defrauded, so that others who are interested cannot be restored to their former rights, the contract cannot be rescinded, and nothing remains to the party defrauded but a reparation in damages." See also *Nicol's Case*, 3 De Gex & J. 387, where, apart from considerations of the above character (which prevented recovery), the Lord Chancellor and Lord Justice Turner were at variance as to whether the

company could be chargeable with the misrepresentations of the directors in the course of the business. See further, *Parbury's Case*, 3 De Gex & S. 43; *Bell's Case*, 22 Beav. 35; *Holt's Case*, ib. 53; *Burnes v. Pennell*, 2 H. L. Cas. 497; *Deposit Life Assur. Co. v. Ayscough*, 6 El. & B. 761; *Barrett's Case*, 3 De Gex, J. & S. 30.

However, these cases clearly establish the principle that a party to a joint-stock company, or other association, can neither maintain a bill in equity against the company to be relieved from liability, nor defend an action on his subscription, by alleging the false representations of the company or its agents, unless, first, he repudiates the contract promptly before the rights and interests of others have been affected by his action; or unless, secondly, all the other members of the company interested united in the false statements. As to this last point, see the suggestion of *Bruce, V. C.*: "If it were established that the only other persons interested in these affairs were the persons who made the alleged misrepresentations, the case might be different." *Parbury's Case*.

The first qualification deserves a passing notice. *Bell's Case*, 22 Beav. 35, illustrates it. There the objects of the company, into membership of which the plaintiff had been drawn by false representations of the directors, had at the time totally failed, and the company had become insolvent, and practically at an end; and it was held that the plaintiff was not liable as a contributory. The Master of the Rolls observed that the doctrine of *Parbury's Case* was this: that where certain persons set on foot a project, and by fraudulent representations induce others to become shareholders, and incur liabilities, there, as between those who are equally innocent

shareholders, all are liable to contribute towards payment of the debts of the concern. Their rights lay against those who had made the misrepresentations. But no authority could be found making parties liable to contribute in cases such as this. See also *Ayre's Case*, 25 Beav. 513, where, through false statements, a person having taken shares in a company insolvent at the time, and, upon discovering the fact, having repudiated his shares, was held not to be a contributory.

But if the person claiming relief purchased his shares from a third person, and not from the company, he will be bound to contribute, though he were induced to make the purchase by the false representations of the company. (Nor in such case, clearly, would he have a right of action for deceit against the company. *Peck v. Gurney*, 43 Law J. Ch. 19, in the House of Lords. See *Ayre's Case*, *supra*; *Duranty's Case*, 26 Beav. 268.) And this would doubtless be true, though the vendor of the shares were also guilty of fraudulent representations, unless the vendee had repudiated and rescinded the sale. *Ibid*.

The opinion of the Court of Chancery (with the exception of that of the Vice-Chancellor in *Brockwell's Case*, *supra*, which, as has been stated, was overruled) is uniform in these cases that the company or corporation cannot be made liable to an action for the unauthorized fraudulent representations of its agents; and that the latter are not authorized by their mere position to make false statements concerning the condition of their principals. Of course, if the company subsequently ratify the misrepresentations at a meeting of the shareholders, the fraud will then be fixed on them: *Nicol's Case*, *supra*; *New Brunswick Ry. v. Conybeare*, 9

H. L. Cas. 711; but even then the party defrauded will not be able to escape liability to contribute in winding up if the rights of others, innocent persons, have intervened or been affected by his action, or if he have participated in any benefits of the concern. His remedy is by an action of deceit against the agent, or the company, or both. It is worthy of notice, also, that in one of the above cases (*Mixer's Case*) the ruling that the company are not liable for the false representations made by its agents without express authority was made in appeal in chancery; which gives the decision the same authority as the decisions of the Exchequer Chamber at law.

The decision of the Vice-Chancellor in *Brockwell's Case* was based principally upon language of the Lord Chancellor and of Lord St. Leonards in *National Exchange Co. v. Drew*, 2 Macq. 103, 125, 139. That was a Scotch case, — an action to recover the amount of a loan. The facts, in short, were that the defendants had been induced by the false representations of the plaintiff's manager to buy shares in the plaintiff's enterprise upon a loan of money by the plaintiffs for the purpose; the object being to bolster and raise up the shares of the company in the market. The shares became valueless; and the company sued to recover the amount of the loan. Judgment was given for the defendants.

Although this case contains expressions to the effect that such companies are bound by the false representations of their agents, made in the course of their business, it is to be observed, as stated by Lord Brougham and Lord St. Leonards, that the company had the benefit of the fraud of their manager. It appears, also, that the defendants

had acted upon a report made to the shareholders at a regular meeting; and, as Lord St. Leonards said, the first act that takes place at such meetings is, that, if there is not a rejection of the report, there is an adoption of it. And the representation was, therefore, the company's; and though the shareholders were ignorant of its untruth, it was a matter within their own peculiar knowledge, and not within that of the defendants. So that, on the principle of cases referred to in a previous part of this note, pp. 21, 22, the company might well be chargeable with fraud. See also *New Brunswick Railway Co.*, 9 H. L. Cas. 711, 725.

Besides, this was an action of contract; and it may be doubted if, in such cases, the defence of fraud is to have the same force as in an action by the defendant for the fraud. It is often true that innocent misrepresentations are sufficient to defeat a recovery in contract; but, to maintain an action of deceit, the false statement must have been made with knowledge. See *Western Bank v. Addie*, Law R. 1 H. L. Scotch, 145, 158, 167; *New Brunswick Railway Co. v. Conybeare*, 9 H. L. Cas. 711, 740. So, too, a concealment of material facts will defeat an action upon a contract; but nothing short of an active misrepresentation, it is held, will support an action for deceit. *Peck v. Gurney*, 43 Law J. Ch. 19. See a further distinction near the end of this note.

New Brunswick Railway Co. v. Conybeare, 9 H. L. Cas. 711, was a suit for the rescission of a contract for the purchase of shares, on the ground of fraud in the defendants' agent. It was held that the facts were not sufficient to sustain the bill; but Lord Cranworth takes occasion to allude to

the distinction between actions of this kind and actions of deceit. Referring to his opinion in *Ranger v. Great Western Railway Co.*, 5 H. L. Cas. 72, *infra*, he said: "My lords, to that opinion I entirely adhere; and I think it would have been applicable in this case, if it had been proved that there had been a fraudulent representation or concealment by the directors in order to induce Mr. Conybeare to purchase, not shares in the market (that is a very different thing), but shares *belonging to the company*, namely, forfeited shares, if the directors, or the secretary acting for them, had fraudulently represented something to him which was untrue, I then adhered to the opinion which I had expressed in the former cases, that the company would have been bound by that fraud. [This sentence is somewhat obscure, but it is correctly quoted from the Report.] But the principle cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person, not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorized him to be guilty of."

The case of *Ranger v. Great Western Railway Co.*, to which his lordship referred, was a similar suit for rescission, in which the allegations of fraud failed. The opinion there expressed (to which, in *New Brunswick Railway Co. v. Conybeare*, he says he adheres)

was to the effect that, if an incorporated company, acting by an agent, induces a person to enter into a contract *for the benefit of the company*, that company can no more repudiate the fraudulent action of the agent than an individual could.

It thus appears that there was little ground upon which to support the decision of Vice-Chancellor Kindersley, in *Brockwell's Case*.

Cornfoot v. Fowke, 6 Mees. & W. 358, though constantly cited in these cases, is in point only in its *dicta*. Besides being an action of contract, the misrepresentations alleged in defence were false to the knowledge of the principal, but not to the knowledge of the agent. It was held (Lord Abinger, C. B., dissenting) that the plea of fraud was not supported. There was nothing to show that the principal had caused the agent to make the untrue statement, or that he knew that any misrepresentation had been made. And, therefore, according to the majority of the court, fraud could not be imputed to him.

There are many other cases of contract in which this subject is considered; but their application to actions of deceit, as has been suggested, is doubtful, and they will not be further pursued. See *Wilde v. Gibson*, 1 H. L. Cas. 605.

In 1867 the precise case of the liability of a principal in an action in tort for representations of an agent, false to the knowledge of the latter, but not to that of the former, arose simultaneously in the Exchequer Chamber and in the House of Lords; and, each court proceeding independently of the other, the former held the principal liable, and the latter held the contrary. *Barwick v. English Joint-Stock Bank*, Law R. 2 Ex. 259; *Western Bank v. Addie*, Law

R. 1 H. L. Scotch, 145. But the cases are not necessarily in conflict.

In *Barwick v. English Joint-Stock Bank*, the facts, in brief, were these: The plaintiff required a guaranty of the responsibility of one J. D., which the defendants' manager gave, to the effect that the checks of J. D. should be paid, on receipt of certain money (from the government) from J. D., "in priority to any other payment, except to this bank." J. D. was at the time of the guaranty largely indebted to the bank, which fact was not communicated to the plaintiff; and the defendants declined to honor the check of J. D., though drawn after he had received and deposited the money referred to. The plaintiff now brought an action against the bank for the false representations of the manager; and it was held that there was evidence to go to the jury that the manager knew and intended that the guaranty should be unavailing, and fraudulently concealed from the plaintiff the fact of the indebtedness of J. D. to the bank. It was also held that the defendants would be liable for such fraud in their manager.

This, it will be noticed, was not the case of a representation of fact in which the defendants were not interested, since, by the manager's fraud, they obtained and appropriated to themselves a deposit of money in favor of their debtor; and this is the turning-point of the case, as appears from the opinion of the court. "It was contended on behalf of the bank," said Mr. Justice Willes, in delivering the judgment, "that inasmuch as the guaranty contains a stipulation that the plaintiff's debt should be paid subsequently to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I

speaking sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government check, by keeping back from the plaintiff the state of Davis's (J. D.'s) account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of."

Again, after commenting upon *Udell v. Atherton*, 7 Hurl. & N. 172 (in which he said that the court were divided rather upon the proper application of the law to the facts than upon the principle involved), the learned justice proceeded to say: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master is proved;" citing *Laugher v. Pointer*, 5 Barn. & C. 547, 554.

The nature of the action is still more clearly shown in a subsequent part of the opinion in this case. It had been objected that the count in fraud should not have described the fraud of the manager as that of the bank; to meet which objection a count for money had and received had been included in the declaration. The court replied: "I need not go into the question whether

it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case,"—thus indicating that the action was, in substance, an action for money received to the plaintiff's use. See *Clarke v. Dickson*, El., B. & E. 148.

The case in the House of Lords, above referred to (*Western Bank v. Aldie*), was a Scotch suit, to rescind a contract for the purchase of shares, and for restitution *in integrum* (i.e., to the party's position before the contract), or, alternatively, for damages for the false representations of the defendants' manager. There being no direct fraud on the part of the bank itself, it was held that the action could not be maintained; and the determination as to the alternative claim for redress was not affected by the fact that the plaintiff was a member of the company, and had been for a long time. Nor would it have been an answer to this suit of redress, as the Lord Chancellor stated, that a recovery might prejudice those who had innocently acquired their shares after the plaintiff had acquired his. The ground of decision was that the fraud of the manager alone, though committed in the course of his business, could not be made the ground of a liability in tort on the part of the defendants. This conclusion was reached upon a review of all the important cases, and with a view, as the report states (p. 151), of laying down the proper rule of law. The case is therefore of great importance and authority.

The Lord Chancellor said that the sound distinction to be drawn from the authorities was this: "Where a person

has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company; and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally."

Lord Cranworth, who delivered the only other opinion concerning the principle involved, stated the doctrine in the same way. "An attentive consideration of the cases," said he, "has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrong-doers, by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud [as where, by delay, the rights of innocent persons have intervened], must seek his remedy against the directors personally."

It would seem that such a decision,

coming from the court of final resort, should have put to rest all further doubt. But the question has very lately arisen again in the Queen's Bench; and that court has (except upon the suggestion, *infra*) apparently declined to follow the rule declared by the House of Lords. *Swift v. Winterbotham*, Law R. 8 Q. B. 244, decided in 1873.

The case professes to have been decided upon the authority of *Barwick v. English Joint-Stock Bank*, *supra*. But that case does not support it. The action was for a false and fraudulent representation, jointly against the agent who had made it and against the principal. And the latter was held equally liable. (The case has been referred to as authority for another point, *ante*, p. 29.) The false statement consisted in an affirmation of the solvency of Sir William Russell. The matter was indifferent to the defendants. The representation was not made for the purpose of obtaining a benefit for the banking company; nor does it appear that any advantage was derived from it. The case is therefore unlike *Barwick v. English Joint-Stock Bank*, and opposed to the ground taken in that case, as well as in conflict with the decisions of the Court of Chancery and the House of Lords; unless the fact that the court held that the communication complained of (which was in writing) was in reality the representation of the banking company, affords a distinction. The inquiry was made concerning a customer of the defendants; and the reply was signed, "J. B. Goddard, Manager." And the court say, "We think it clear, therefore, that the communications were in fact, and were intended to be, communications between the banks." The fact inquired of was peculiarly within the knowledge of the defendants; and upon the ruling that

the signature of the manager was, in fact, the signature of the bank, the case would not, perhaps, be inconsistent with *Western Bank v. Addie*. But this ruling as to the manager's signature was decided, on appeal to the Exchequer Chamber, to be wrong; and the case was reversed. 30 *Law Times*, N. S. 31, *sub nom.* *Swift v. Jewesbury*.

Lord Coleridge, C. J., who delivered the principal opinion, said that this decision did not conflict with *Barwick v. English Joint-Stock Bank*, "because," he observed, "there can be no doubt that a different set of principles altogether applies where an agent of a corporation, or a joint-stock company, at any rate, in carrying on its business, *does something of which the company takes advantage*, or profits, or may profit, and it turns out that the act of the agent is fraudulent."

The latest case, decided within six weeks of the present writing, was determined in the Privy Council. *Mackay v. Commercial Bank*, 30 *Law Times*, N. S. 180. There the defendants had derived a benefit from the fraudulent misrepresentation of their manager, made within the general scope of his authority; and upon this precise ground the defendants were held liable. The court declined to give any opinion as to the rule where no advantage had been derived by the principal.

We find, then, no English case in which a principal has been held liable in tort for the unauthorized and fraudulent representations of his agent alone, except where he has derived a benefit from them. And even where an advantage has been obtained, it is questionable, as we have suggested, if this form of action be proper. The action, where the benefit is pecuniary, is in substance an action for money had and

received; and if the suit be in tort, it can only be allowable, it would seem, so far as it conforms, in the amount of damages recoverable, to the proper form of action. See *Mackay v. Commercial Bank*, *supra*, where, to an objection that an action for money had and received might lie in such cases, the court say, that, granting *that*, the question to be tried would be in substance the same, and add, what perhaps has been the real justification of these cases, that the time has passed when much importance is to be attached to mere forms of action. In other words, the plaintiff, being entitled to a remedy of some kind, will not be put to the expense of being sent to the technically proper action. It may be observed, also, that, by taking the benefit of the agent's fraud, the principal adopts it; and he may, therefore, be liable in an act for deceit, perhaps, in the same way that he would have been had he at first authorized the misrepresentation of a fact peculiarly within his means of knowledge.

We conceive, therefore, that the ground taken in *Hern v. Nichols* for supporting actions of this kind—the trust and confidence reposed in the agent—is not sustained by the later English authorities, the proper ground for such cases being the fact that the principal has received a benefit, as he had there, from the fraud of his agent; and that, if this be not the case, the principal can only be liable when he has authorized, or ratified, or joined in, the false statement.

If this be true, it follows that the doctrine of *Jeffrey v. Bigelow* and of *White v. Sawyer*, referred to near the beginning of this discussion, extending the damages beyond the amount of the benefit received by the principal, is not

sound. It is difficult to deny, however, that the rule in these cases would be correct if an action of deceit were the proper form of suit in such cases.

Aside from the authorities, it is not easy to understand the cases which suggest (where the representation is made in a transaction not for the principal) that the defendant's liability arises from his putting a trust and confidence in the agent, or, what is the same thing, in holding him out as agent. It is submitted that he does no such thing without giving the agent express authority to make the representation complained of; except, perhaps, in those cases where he derives a benefit from the agent's act. A principal holds out his agent as authorized to transact his (the principal's) business, and not that of third persons, in which the principal has no concern. It is hardly conceivable that he should have any other purpose in the appointment of an agent; and everybody knows it. Consequently, when the plaintiff goes to the defendant's agent for information in a matter which has no relation to the defendant's business, he knows, if he is a man of common sense, that that is outside of the legitimate purpose of the agency, and that he must rely, if at all, upon the responsibility of the agent in case false information be given.

If the principal expressly authorize the agent to make the statement, the case is more difficult; but we conceive that the same principles should apply as if the principal had himself made it. If he is aware of its falsity, or, perhaps, if it is a matter peculiarly within his own means of knowledge, he will be liable for permitting his agent to commit the fraud on the plaintiff. But on what principle he could be held for a misrepresentation made as to a matter

indifferent to him, where he is innocent of any improper motive in allowing the agent to speak for him, is not easily understood. If he were himself to make the statement, he would not be liable; why, then, should he be liable for allowing another to do so for him? The plaintiff is no worse off by inquiring of the agent than if he had inquired of the principal.

It is said that the principal is liable, under the rule that of two innocent persons he who enables a third person to commit a fraud upon the other must suffer the loss. *Nelson, J., in Sandford v. Handy*, 23 Wend. 260. But is it true that the principal has enabled his agent to commit a fraud on the plaintiff? In most cases it is not. The plaintiff has made inquiry of the agent, not because of his authority to give the desired information, but because he *possessed* that information. He treats him for such purpose not as an agent, but as one acting on his own responsibility. If it be replied that he acquired his information by reason of his situation in the defendant's employment, the answer to this is, that such a connection between the defendant and the plaintiff is too remote. The rule of liability between innocent persons is subject to the rule of proximate and remote cause.

Now, in all probability the plaintiff knew nothing of the fact that the agent had authority to make the representation. The presumption is, as we have seen, that it was outside of his ordinary powers, to the plaintiff's knowledge; and he would seldom stop to inquire into the matter. At all events, the burden of proof should be upon him to show that, in acting upon the representation, he relied upon the defendant's grant of authority.

The rule, if there is such a one, that

a principal is supposed to know what his agent knows, is, we conceive, confined to the case of contracts and sales. It probably means no more than this: that, mutual assent being essential to binding transactions in contract, that is wanting where a material misrepresentation has been made by one having a right to make the contract. The injured party has not agreed to do or accept the thing for which the principal seeks to bind him; and thus the principal is bound by the fraud of his agent. It is not because of the fraud of the agent; since the same result would follow in many cases where the agent himself were innocent, as in cases of mistake.

In the early law, under the old writ of deceit, we find that it was necessary to prove fraud directly upon the defendant. And there is a case in the Year-Books (9 Henry 6, 53, pl. 37; s. c. Brooke's Abr. Accion sur la Case, pl. 8) involving the very question now under consideration. It was, in substance, as follows:—

Writ of deceit on the case by A. against B. and C., in the sale of Rummney wine, said C. knowing it to be sour and unfit for use. Rolf, for the defence, having taken certain objections to the writ (one of which was that no warranty was alleged), which were overruled, pleaded for B. that the wine was not sour, upon which issue was joined. For C., he pleaded that he sold the wine by B., his servant. To which Martin, J., replied: But "of your own knowledge you deceived" the plaintiff. — Rolf. "If I have a servant, who is my salesman, and goes to a fair with an unsound horse, or other merchandise, and sells it, will the party [pty] have an action of deceit on the case against me? Clearly not." — Martin, J. "You say

true; for you did not command him to sell the thing to him, nor to any person in particular. But if your servant, by your covin and command, sell one bad wine, he shall have an action against you; for it is your own sale. And if the case should be that you did not bid your servant sell to that very person, then you can say that you did not sell to the plaintiff."

Rolf did not appear to be satisfied with this last refinement, replying that it would be a risky thing to put that into the mouth of the common people.

Mr. Justice Nelson, indeed, says that this case was overruled by Lord Holt in *Hern v. Nichols*. Sandford v. Handy, *supra*. But the report of that case does not show any thing of the kind, except in the ground of the decision, which has itself been overruled, as we have seen. The point decided in *Hern v. Nichols* is distinguishable from the case in the Year-Book, on the ground that the defendant had there obtained a benefit from the agent's act. And though this was also the fact apparently, in the other case, that was decided at a time when the form of action precluded any notice of such fact. This old case, therefore, also supports the position that the action of deceit is not the proper proceeding, even where the defendant has derived a benefit from his agent's misrepresentation.

There is one more difficulty worthy of notice, presented by the class of cases in which it is held that the principal is liable in tort for the acts of misconduct of his agent in the course of his employment; though he be acting without authority, or contrary to the express instructions of his principal. See *Willes, J., in Barwick v. English Joint-Stock Bank*, Law R. 2 Ex. 259,

265; *Whatman v. Pearson*, Law R. 3 C. P. 422; *Burns v. Poulson*, Law R. 8 C. P. 563; *Limpus v. London Omnibus Co.*, 1 Hurl. & C. 526; s. c. 32 Law J. Ex. 34. But these cases are not easily understood except upon the principle of a special public policy, which finds it important to hold the master responsible for the extraordinary conduct of his agent within the line of the agency. In *Limpus v. London Omnibus Co.*, *supra*, which was a case of misconduct by an omnibus-driver, Mr. Justice Willes refers the right of action against the principal in part to the impecuniosity of that class of servants. "There ought to be a remedy," he says, "against some person capable of paying damages to those injured by improper driving." This is doubtless the real ground of the master's liability in such cases. But, we submit, that a public policy which points to a state of facts which varies with almost every case, and often fixes a liability where there is no need of it (for agents are often responsible), should not be extended to a new and different class of cases.

But there is a better reason for limiting this rule of public policy. The negligence or misconduct of an agent for which the cases hold the principal liable, probably never involves any deep moral turpitude. If the conduct of the agent were of such character, the principal would not be held liable. For instance, — to take a case often put, — if a servant shoeing a horse should maliciously prick him, he, and not the master, would be liable; though it would be otherwise if it were not intentionally done. And it is immaterial that the act, in cases of this kind, may have been intended for the benefit of the principal. See the language of

Blackburn, J., in *Limpus v. London Omnibus Co.*, *supra*, quoted with approval by Brett, J., in *Burns v. Poulson*, *supra*.

The action for deceit more nearly resembles this class of cases. The allegation always is that the representation was made "falsely and fraudulently." A lie is charged, and charged to have been told with the base motive of injuring another. The proof need not be so strong in all cases; but fraud, actual or constructive, must be made out. Now it can no more properly be held that such a misrepresentation binds the principal, than that the other-mentioned malicious misconduct of the agent does; and as the rule of public policy does not extend to the latter class of cases, it should not to the former.

It is to be observed that it is no answer to the action that the defendant is a corporation. It is settled that a corporation, though having no soul, is liable for the authorized deceit of its agents. See *Brokaw v. New Jersey Ry. Co.*, 3 Vroom, 328; *Vance v. Erie Ry. Co.*, ib. 334, 335; *Fogg v. Griffin*, 2 Allen, 1; *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 72; *Addie v. Western Bank*, Law R. 1 H. L. Scotch, 145; *Mackay v. Commercial Bank*, 30 Law Times, n s. 180. But this would probably be otherwise where the misrepresentation was made before the incorporation of the body. In such case, the action should be against the individuals personally. See *Addie v. Western Bank*, *supra*.

The Intention. — It is well settled that it is not necessary that the misrepresentation complained of should have been made with a corrupt motive of personal gain on the part of the defendant, in order to render him liable. *Foster v.*

Charles, 6 Bing. 396; s. c. 7 Bing. 105.

But while it is not necessary that the defendant should have made the false statement with the motive of personal gain, it is necessary to show that it was made with the purpose of affecting the conduct of the plaintiff; or, to use the more common expression, with intent to induce the plaintiff to take the action complained of. See *Thom v. Bigland*, 8 Ex. 725, 731; *Tapp v. Lee*, 3 Bos. & P. 367; *Watson v. Poulson*, 15 Jur. 1112; *Polhill v. Walter*, 3 Barn. & Ad. 123.

This is illustrated in *Tapp v. Lee*, 3 Bos. & P. 367. The plaintiffs' servant was sent to inquire concerning the responsibility of one Brunell; and the defendant, though knowing that he was a bankrupt, replied that Brunell was an honest man, that he owed the defendant, and that he (the defendant) was willing to trust him more. It was alleged that Brunell was not an honest man, as the defendant well knew, and that the defendant was *not* willing to give him farther credit. The defendant, having afterwards met the plaintiffs' servant, inquired if they had trusted Brunell; and, upon receiving an affirmative reply, said: "I did not think you was such a cake," by the last word meaning, apparently, dupe. The jury having found a verdict for the plaintiff, a motion to set the same aside was made on the ground that (notwithstanding the knowledge of the falsity of the defendant's representation) there was no evidence of a fraudulent intent; and the motion was granted, terms of costs being imposed on the ground that the above-quoted remark, appearing like exultation, was *some* evidence of fraud, so that the verdict was not wholly unsupported. Lord Alvanley, C. J., said:

"In stating my opinion to the jury on the evidence in this case, I told them that unless they believed that the party knew the representation to be false at the time when he made it, and *intended thereby to obtain credit for Brunell*, they ought not to find a verdict for the plaintiff." Mr. Justice Heath said: "The evidence of fraud turned on a single expression of the defendant, that he did not think the plaintiffs' servant had been such a cake; the effect of which was to be decided upon by them. If he meant to say that he did not think the plaintiffs' servant would have been such a dupe, it would seem as if he meant to exult in the calamity into which he had led his fellow-tradesman."

Foster v. Charles, 6 Bing. 396, s. c. 7 Bing. 105, is not inconsistent with this position; for although it is said that nothing more is necessary to maintain the action than to prove the untruth of the suggestion which has occasioned the injury, and the knowledge of its untruth by the defendant (*Gaselee, J.*, 6 Bing. 403), this was said in answer to the position that there must have been a motive of personal gain on the part of the defendant. See 7 Bing. 106, where the argument is more distinctly stated than on the first trial. It was not meant that it was not necessary to prove that the defendant did not intend, in *any* way, to injure the plaintiff. On the second trial, *Tindal, C. J.*, said that the attention of the jury had been drawn to two classes of motives possible to the defendant: first, a desire to benefit himself by making a statement which he knew to be false (which the jury negatived); and, secondly, a desire to benefit some third person. So, too, upon this occasion, *Gaselee, J.*, said that the right of action was complete when the

intention to mislead was followed by actual injury.

When, therefore, it is said that an action cannot be maintained for a bare lie, the meaning is that it must be told with intent to mislead, as well as followed by injury.

However, it need not be proved in all cases that the defendant intended to *injure* the plaintiff in making the representation. He may, in fact, have intended an advantage to him; and it is enough that the defendant intended that the plaintiff should act upon the representation, if he chose to do so. This is illustrated in *Polhill v. Walter*, 3 Barn. & Ad. 114, and in other cases of false representations of a party's authority to act for another.

If the party would escape the consequences of his false representation, he must actually withdraw it before it has been acted upon. It will not suffice that he repents of his fraudulent intent, and clears his own mind from the bad motive, before the injury has taken place. See *Lobdell v. Baker*, 1 Met. 193, where an indorsement of a promissory note by an infant had been fraudulently procured; and in trespass on the case by the person to whom the note was passed, the question was, whether it was necessary for the plaintiff to prove a fraudulent intent at the time of passing the note, as well as at the time of procuring the indorsement. The answer was in the negative.

Acting upon the Misrepresentation.

— It is of course fundamental that the representation should have been acted upon. The plaintiff can only maintain the action upon proof of damage, as was said by the judges in *Pasley v. Freeman*. And it is to be observed that there are two classes of cases: first, where the representation is made

of the plaintiff to a third person, *post*, pp. 54, 69; secondly, where it is made *to or for* the plaintiff, as in *Pasley v. Freeman*. But both, when acted upon, give a like right to damages.

In the second class of cases, if the false representation was intended for others than those to whom it was made, it may give a right of action to any such who may act upon it; as in the case of *Polhill v. Walter*, 2 Barn. & Ad. 114. There the defendant had given an acceptance of a negotiable bill as by procuration for the drawee, without authority, believing that the act would be sanctioned by the latter; and it was held that the plaintiff (who had subsequently purchased the bill) had a right of action for the false representation of authority, though it had not been made to him.

So, too, in *Langridge v. Levy*, 2 Mees. & W. 519, s. c. 4 Mees. & W. 337, where the representation was made to the plaintiff's father, with a view to being acted upon by the plaintiff, the action was held proper. "The defendant," said Parke, B., in delivering the judgment of the Exchequer, "has knowingly sold the gun to the father, *for the purpose of being used by the plaintiff*, by loading and discharging it, and has knowingly made a false warranty that it might safely be done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true (for this is the meaning of the term *confiding*), used the gun, and thereby sustained the damage which is the subject of this complaint." And he adds, by way of explaining the use of the word "warranty," "The warranty between these parties has not the effect of a contract. It is no more than a representation; but it is no less."

So, where directors of a company put forth a prospectus containing false representations for the purpose of selling shares of stock, the false representations are deemed in law to have been made to all who read the prospectus and become purchasers *from the company* on the faith of the statements therein made. *Barry v. Croskey*, 2 Johns. & H. 21; *Bedford v. Bagshaw*, 4 Hurl. & N. 548; s. c. 29 Law J. Ex. 59; *Bagshaw v. Seymour*, ib. 62, note; *Scott v. Dixon*, ib. 62, note; *Gerhard v. Bates*, 2 El. & B. 476; *Clarke v. Dickson*, 6 Com. B. N. s. 453; *Cazeux v. Meli*, 25 Barb. 583; *National Exchange Co. v. Drew*, 2 Macq. 103; *Peek v. Gurney*, 43 Law J. Ch. 19.

In *Swift v. Winterbotham*, Law R. 8 Q. B. 244, the defendants had given false information concerning the standing of a third person on request of the plaintiff through his banker; and it was objected that, as the representation had not been made to the plaintiff, he had no right of action. But it appeared that it was usual for customers of a bank to make inquiries of this description through the bank, since bankers uniformly refuse to answer inquiries made by strangers; and it was therefore held that the plaintiff was entitled to recover. The rule was thus declared: "It is now well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the

plaintiff, as one of the public, acts on it, and suffers damage thereby."

But if the representation, however false and fraudulent, be communicated by an intervening person, he must have authority to carry it to the plaintiff; otherwise the defendant will not be liable though the plaintiff in fact acted upon the representation. This point was lately decided in the House of Lords. *Peek v. Gurney*, 43 Law J. Ch. 19. This was a proceeding in equity to obtain damages for false representations made by the defendants in a prospectus concerning a bill-broking business. This prospectus was addressed to the public, and invited proposals for allotment of shares. The plaintiff had not purchased his shares from the company, but on the market; though he had done this in reliance upon the truthfulness of the statements contained in the prospectus. It was held that he was not entitled to judgment; and *Bedford v. Bagshaw* and *Bagshaw v. Seymour*, *supra*, were overruled, as having carried the doctrine of liability in such cases too far.

Lord Chelmsford said that the case of *Gerhard v. Bates*, *supra*, was not an authority for holding that upon a prospectus addressed to the public by the directors of a company, any one of the public who had been led to take shares upon the faith of the representations thus published could maintain an action against them. The observations of Lord Campbell were to the same effect. "It appears to me," the learned judge continued, "that there must be something to connect the directors making the representation with the party complaining that he has been deceived and injured by it; as in *Scott v. Dickson*, *supra*, by selling a report containing the misrepresentation

complained of to a person who afterwards purchases shares upon the faith of it; or, as suggested in *Gerhard v. Bates*, *supra*, by delivering the fraudulent prospectus to a person who thereupon becomes a purchaser of shares; or by making an allotment of shares to a person who has been induced by the prospectus to apply for such allotment. In all these cases, the parties, in one way or other, are brought into direct communication; and in an action the misrepresentation would be properly alleged to have been made by the defendant to the plaintiff. But the purchaser of shares in the market, upon the faith of a prospectus which he has not received from those who are answerable for it, cannot by acting upon it so connect himself with them as to render them liable to him for the misrepresentations contained in it as if it had been addressed personally to himself."

Lord Cairns stated the law very clearly. The object of the prospectus, he said, was clearly to invite the public to take shares in the new company. Appended to it there was a form of application to be filled up. But the plaintiff did not avail himself of this means of securing shares. The shares had been speedily applied for and taken up; and the allotment having been completed, the prospectus had done its work, and was exhausted. Several months afterwards the plaintiff had purchased his shares at the stock exchange, at a high premium, not even knowing at first, of course, from whom he bought them. "How," said he further, "can the directors of a company be liable after the full original allotment of shares, for all the subsequent dealings which may take place with regard to those shares upon the stock exchange? If the argument of the ap-

pellant is right, they must be liable *ad infinitum*, for I know no means of pointing out any time at which the liability would in point of fact cease. Not only so, but if the argument be right they must be liable no matter what the premium may be at which the shares may be sold. That premium may rise from time to time from circumstances altogether unconnected with the prospectus; and yet, if the argument be right, the appellant would be entitled to call upon the directors to indemnify him up to the highest point at which the shares may be sold for all that he may expend in buying the shares."

Representations concerning Solvency. — Upon the facts of *Pasley v. Freeman*, the decision has been sometimes criticised. The mere form of the representation, it is said, took the case out of the purview of the Statute of Frauds. If, instead of asserting that Falch was a person to be trusted, the defendant had said to the plaintiff, you may trust Falch, and if he doesn't pay you I will, the case would have come within the terms of the Statute of Frauds. See *Evans v. Bicknell*, 6 Ves. 174, 186. The case was also doubted in *Slade v. Little*, 20 Ga. 371, 375, on the same ground apparently. See also *Newsom v. Jackson*, 26 Ga. 241, 248. "I am old enough," said Gibbs, C. J., in *Ashlin v. White*, Holt, N. P. 387, "to remember when this species of action came into use. It was dexterously intended to avoid the Statute of Frauds." And he adds that when the principle once gained ground, a flood of cases followed. The anomaly led in England to the passage of an act extending the Statute of Frauds to such cases. Lord Tenterden's Act, 6 Geo. 4, c. 14. So in Maine, Vermont, Massa-

chusetts, Virginia, Alabama, Kentucky, Michigan, Indiana, and Missouri. See *Brown*, Statute of Frauds, Appendix.

The objection of the Statute of Frauds, which seems not to have been suggested in *Pasley v. Freeman*, was raised in *Eyre v. Dunsford*, 1 East, 818, tried in 1801. This was an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted one W. T. on the representations of the defendant. The plaintiffs, it appeared, applied to the defendant for information concerning the responsibility of W. T., to which the defendant answered that he knew nothing of the person but what he had learned from his correspondent abroad; but that he had a credit for a large sum lodged with him by a respectable house at Hamburg; and that upon a view of all the circumstances which had come to his (the defendant's) knowledge, the plaintiffs might safely credit W. T. The truth was that the credit referred to was lodged on condition that W. T. should previously lodge with the defendant goods of treble the value. The action was sustained, although the defendant had attempted to shield himself by adding that he gave the advice to the plaintiffs without prejudice to himself. Lord Kenyon said that the statute had no relation to cases of this kind. It raised certain legal presumptions of fraud from the want of certain formalities in contracts and other transactions, against which it guarded by declaring them void, but that idea had no application to actions founded on actual fraud and deceit.

In *Tapp v. Lee*, 3 Bos. & P. 367, referred to *ante*, p. 36, *Chambre, J.*, said: "Cases of this sort are within all the mischief intended to be prevented by the Statute of Frauds; but

I think that statute does not extend to them. I much wish, indeed, that it did, not only on account of the extensive consequences to those against whom such actions are brought, but in respect of the evidence to be produced at the trial. It is very desirable that representations of character, by which parties are made liable, as well as engagements for the debts of third persons, should be in writing; but that is not the law."

The doctrine of these cases, that an action for the damage caused by fraudulent representations of solvency is not within the original Statute of Frauds, and is therefore maintainable though the words were oral, is generally accepted in this country. *Upton v. Vail*, 6 Johns. 181; *Wise v. Wilcox*, 1 Day, 22; *Weeks v. Burton*, 7 Vt. 67; *Ewins v. Calhoun*, ib. 79; *Newsom v. Jackson*, 26 Ga. 241; *Patten v. Gurney*, 17 Mass. 182. But see *Slade v. Little*, 20 Ga. 371.

In *Upton v. Vail*, *supra*, *Kent, C. J.*, said: "The only plausible objection to it [*Pasley v. Freeman*] is that in its application to this case it comes within the mischiefs which gave rise to the Statute of Frauds, and that, therefore, the representation ought to be in writing. But this, I apprehend, is an objection arising from policy and expediency; for it is certain that the Statute of Frauds, as it now stands, has nothing to do with the case."

It has further been held that the plaintiff does not lose his right of action for a fraudulent misrepresentation of the circumstances of another by the fact that the defendant added, "If he does not pay for the goods, I will." *Hamar v. Alexander*, 2 Bos. & P. N. R. 241.

The doctrine of these cases came

under further consideration in *Hutchinson v. Bell*, 1 Taunt. 558. In this case the plaintiff had opened an account with a third person upon the defendant's fraudulent misrepresentation as to his pecuniary circumstances; and this person had in fact paid for the first five parcels of goods ordered. Subsequently the plaintiff (having in the mean time given further credit to the party) was applied to for more goods, which were sold accordingly; but before delivery the plaintiff wrote the party that he must have a more satisfactory reference as to his responsibility, and requested him to pay for the goods he had just bought. Later he made a payment and purchased another parcel of goods. Other payments were also made on general account at different times. He was afterwards declared a bankrupt; and the plaintiff now sued the defendant for the whole loss which he had sustained. The jury found a verdict for the plaintiff for the amount due at the time the letter above mentioned was written; and the verdict was sustained. Counsel contended that under the letter the subsequent payments should be applied to reduce the debt then due; to which the court replied, that the jury had properly decided that the letter meant, not that the plaintiff would credit the party no longer for the sum then due, but that he would not trust him for any greater sum than was then due. And as the payments made afterwards had been made on general account, the plaintiff was entitled to apply them to the debts contracted after the letter was written.

This case furnishes a suggestion as to the duration of the defendant's liability. So long as the plaintiff relies, or is justified in relying, upon the representation, — that is, so long as

that representation continues to be the inducement to the credit given, — the defendant will be liable, and no longer. If he knew of the falsity of the statement when it was made, he would not be justified in acting upon it at all. The action of deceit would not lie, because he could not have been deceived. So if the defendant should afterwards withdraw his representation, he would not be liable for any subsequent loss; and the same would perhaps be true if he were afterwards credibly informed by another of the true pecuniary condition of the person entrusted. See *Newsom v. Jackson*, 26 Ga. 241, where Lampkin, J., held, according to the headnote, that to make the defendant liable in these cases it must appear, first, that the entire credit was given upon these representations; secondly, if it were not a single transaction, then there must be some reasonable certainty as to the amount of the credit and the length of time to which it should extend; and, thirdly, that the party giving the credit was not himself the victim of blind credulity or overweening confidence. If this third point, however, requires the plaintiff always to adopt other means of ascertaining the party's condition, its correctness may be doubted; as, if the plaintiff were a person of weak mind. See also *Venezuela Ry. Co. v. Kisch*, L. R. 2 H. L. 99.

The case of *Hutchinson v. Bell* also shows that it is not necessary to the plaintiff's right of action for the deceit that the person credited should turn out wholly insolvent and unable to pay any thing. The defendant is liable for the actual loss sustained by reason of his fraud, though it may appear that for a time the statement proved true, as in that case.

In *Gainsford v. Blachford*, 7 Price,

544, s. c. 6 Price, 36, the defendant, in reply to a question concerning the circumstances of a tradesman, told the plaintiff that he had been paid a debt by the party, and that he (the defendant) was ready to give him credit for any thing he wanted. The tradesman had in fact been discharged under an insolvent act before that time, to the defendant's knowledge. It was held that the non-disclosure of this fact was not a ground for an action of deceit. The defendant might well say, even in such a case, that he would trust the tradesman.

In *Patten v. Gurney*, 17 Mass. 182, a joint action by copartners was held to lie against other copartners jointly for a misrepresentation of this kind.

Besides disapproving of the rule in *Pasley v. Freeman*, as an evasion of

the Statute of Frauds, Lord Eldon also doubted whether the case were within the jurisdiction of the law courts. It was, however, a very old head of equity that if a representation be made to another, going to deal in a matter of interest upon the faith of that representation, the party should make good that representation, if he knew it to be false. *Evans v. Bicknell*, 6 Ves. 174, 183. But his successor, Lord Erskine, fully approved of *Pasley v. Freeman* (*Clifford v. Brooke*, 13 Ves. 131, 133); and, apart from the special facts of the case, there has never since been any doubt of the correctness of the principle there involved, — that an action lies for the damage caused by a false and fraudulent representation made with a view to affecting the action of the plaintiff.

MALACHY v. SOPER and Another.

(3 Bing. N. C. 371. Common Pleas, Michaelmas Term, 1836.)

Slander of Title. Plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in chancery, to which plaintiff had demurred. *Held*, that without alleging special damage, plaintiff could not sue defendant for falsely publishing that the demurrer had been overruled; that the prayer of the petition (for the appointment of a receiver) had been granted; and that persons duly authorized had arrived at the mine.

THE declaration stated that the plaintiff before and at the time of the committing of the grievances by the defendant, as herein-after mentioned, was possessed of and interested in divers, to wit, sixteen hundred shares or parts, the whole into divers, to wit, five thousand shares or parts, to be divided, of and in a certain mine commonly known and called by the name of the Wheal Brothers, situate, lying, and being in the parish of Calstock, in the county of Cornwall, such shares being of great value, to wit, of the value of 100,000*l.* That before and at the time of the committing the

grievance by the defendant, as hereinafter mentioned, the said mine had been worked and used, and was then being worked and used, for and on the behalf of the plaintiff and others, the holders of shares and interests in the said mine, to the great benefit and advantage of the plaintiff, and to the great increase of the value of his said shares.

That also before and at the time of the committing of the grievances by the defendant, as hereinafter mentioned, one Horatio Nelson Tollervey had instituted his certain bill of complaint in writing against Malachy, the plaintiff, and others, in the High Court of Chancery of our lord the king; and in and by the said bill of complaint the said H. N. Tollervey claimed to be a holder of and interested in divers shares in the said mine, and disputed the plaintiff's right to the whole of the said shares, and claimed in himself, the said H. N. Tollervey, a right in and to a part of the same. And the said H. N. Tollervey did, in and by his said bill of complaint, pray that the said Malachy, the plaintiff, and others might answer the premises therein mentioned, and make a full and true disclosure and discovery of all and singular the matters therein mentioned, and that H. N. Tollervey might be declared to be entitled to $\frac{188}{600}$ parts or shares of and in said mine, or to such other parts or shares thereof as the said court should be of opinion that he was entitled to, and that a proper legal assignment and transfer thereof might be made to him by all necessary parties; that the said Malachy, the plaintiff, and others might be compelled to come to an account with the said H. N. Tollervey for so much of the profits which had been made in the said mine as, under the circumstances in the said bill mentioned, the said H. N. Tollervey had been entitled to receive in respect of his shares, and so far as such profits had been divided among the shareholders, and to pay to the said H. N. Tollervey what should be due to him on such account; and also to pay to the said H. N. Tollervey, from time to time, his share of the profits of the said mine, which should be divided and paid in respect of such shares as therein mentioned; and that the said H. N. Tollervey might also be declared to be entitled to the like share and interest in the future term therein mentioned to have been granted in the said mine and premises, as he was entitled to in the therein-mentioned lease of the 29th of September, 1833; and that he might

have the benefit thereof secured to him accordingly ; and that the said Malachy, the plaintiff, and others might be restrained by the order and injunction of the said court from selling or disposing of or transferring the said H. N. Tollervey's share and interest in the said mine, or any other shares or interests in the said mine, to the prejudice of the said H. N. Tollervey's rights and interest therein ; and that some proper person might be appointed by the said court as receiver of the said mine and premises, with all usual and proper directions for carrying on the same under the directions of the said court, to the end that the said H. N. Tollervey's shares of the profits thereof might be properly secured for his benefit ; or else that some proper person might be appointed by the said court as receiver of $\frac{1}{600}$ parts of the profits of the said mine, with all usual and necessary directions ; and that the said Malachy, the plaintiff, and others might be restrained by the injunction of the said court from retaining to their own use, or appropriating in any other manner, the said H. N. Tollervey's share of the said profit. And such proceedings were had in the said court, that before and at the time of the committing of the grievances by the defendant, as hereinafter mentioned, the said Malachy, the plaintiff, and the others had demurred to the said bill of complaint, and had demanded the judgment of the said Court of Chancery whether they should be compelled to make any further or other answer to the said bill, or any of the matters therein contained, and they prayed that the same might be thenceforth dismissed. That also before and at the time of the committing of the grievances by the defendants, as hereinafter mentioned, one Richard Deadman Hayward had exhibited his certain bill of complaint in writing against Malachy, the plaintiff, and Samuel Lyle, in the High Court of Chancery of our lord the king, and the said R. D. Hayward in and by his said bill of complaint claimed to be entitled to be a holder of and interested in divers shares in the said mine, and disputed the plaintiff's right to the whole of the said shares, and claimed in himself, the said R. D. Hayward, a right in and to a part of the same ; and the said R. D. Hayward did, in and by the said last-mentioned bill of complaint, pray that the said Malachy, the plaintiff, and S. Lyle might make a full and true disclosure and discovery of all and singular the matters in that bill mentioned, and that it might be declared that as against the

said Malachy, the plaintiff, and S. Lyle the said R. D. Hayward was entitled not only to the two shares in the said bill mentioned in the said mine, and the said property and effects belonging thereto, for which shares he had such certificates as in the said bill were mentioned, but also to five other 500 $\frac{1}{2}$. shares therein, and to all the profits thereof, from the 22d of February, 1834; and that the said Malachy, the plaintiff, and S. Lyle might be compelled to sign and deliver to the said R. D. Hayward certificates of his title to such five shares, or that the said Malachy, the plaintiff, and S. Lyle, might be compelled to procure and deliver to the said R. D. Hayward such certificates; and that he, the plaintiff, might be decreed to pay the costs of that suit, or the costs thereof so far as the same had been made necessary by his conduct; and that the said Malachy, the plaintiff, and S. Lyle might be compelled to account with the said R. D. Hayward for the profits which had been already declared and divided in respect of the said mine, and to pay to the said R. D. Hayward $\frac{7}{10}$ parts of such profits, and also to pay to the said R. D. Hayward for the time to come what the said R. D. Hayward would be entitled to receive in respect of such shares as aforesaid of the profits and proceeds thereafter to be divided amongst the owners of the said mine; and that the said Malachy, the plaintiff, and S. Lyle might be restrained by the injunction of the said court from selling or disposing of their or either of their interests in the said mine, without first giving to the said R. D. Hayward a proper transfer of such shares as aforesaid; and that the said Malachy, the plaintiff, and S. Lyle might be in like manner restrained from making any assignment of the said leases therein mentioned, or either of them; and that the said R. D. Hayward might be protected in the enjoyment of his said therein-mentioned shares of the said mine, and the profits and the produce thereof; and, if it should be necessary, then that some proper person or persons might be appointed by the said court as a manager or managers of the said mine, to manage and conduct the same, and to sell and dispose of the produce thereof, with all usual and necessary directions, and that all usual and necessary directions might be given for taking the said accounts and effectuating the several purposes aforesaid. And such proceedings were had in the said last-mentioned suit, that before and at the time of the committing of the grievances by the defendant, as

hereinafter mentioned, the said S. Lyle had demurred to the said last-mentioned bill of complaints, and had demanded the judgment of the said Court of Chancery whether he should be compelled to make any further or other answer to the said last-mentioned bill, or any of the matters therein contained, and prayed the same to be thence dismissed, with his reasonable costs in that behalf sustained. Yet the defendants well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending, to injure the plaintiff in his said rights, and to cause it to be suspected and believed that the said shares of the plaintiffs were of little or no value, and that the plaintiff had no right to use or work the said mine as aforesaid, and to hinder and prevent the plaintiff from selling or disposing of his said shares, and from deriving or acquiring from the said mine any more profits, emoluments, or advantages whatever, and also to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, to wit, on the 2d of January, 1836, wrongfully and unjustly did publish, and cause and procure to be published, a certain false, malicious, and unfounded libel in a certain public newspaper, of and concerning the plaintiffs and his said shares, and the said using and working of the said mine, and of and concerning the aforesaid suits, bills, and demurrers, that is to say: "Wheal Brothers silver mine (meaning the said mine); Tollervey *v.* Malachi (meaning the first-mentioned suit), and Hayward *v.* Malachi (meaning the second-mentioned suit); in these cases (meaning the said two suits) which arose out of disputes relating to the celebrated silver mine, Wheal Brothers, in the parish of Calstock (meaning the said mine), and which have been brought into the court of the Vice-Chancellor, the learned judge, after hearing long arguments, and a multitude of affidavits, has set aside the demurrers (meaning the said demurrers), and granted the prayer of the petition (meaning the prayer of the petition in each of the said bills as aforesaid, for an account and an injunction), and persons duly authorized have arrived on the workings" (meaning the workings of the said mine); thereby then meaning that the said several demurrers had been set aside by the said court, and that the prayer of the said petition on each of the said bills for an account and injunction had been granted by the said court, and that persons duly authorized by the said court had

arrived on the workings of the said mine, and were hindering and preventing the said mine from being used and worked as it was before the committing of the grievance, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff, and others, the holders of shares in the said mine ; whereas, in truth and in fact, at the time of the committing of the grievance, the said demurrers had not, nor had either of them, been set aside by the said court, nor had the prayer of the said petition, on each of the said bills, for an account and injunction been granted by the said court ; and whereas, in truth and in fact, at the time of the committing of the grievance, no person or persons, duly authorized by the said court, had carried on the workings of the said mine, nor was nor were any person or persons hindering or preventing the said mine from being used and worked as it had been before this committing of the said grievance, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff, and others, the holders of shares in the said mine. By means of which said several premises the plaintiff had been and was greatly injured in his said rights ; and the said shares so possessed by him, and in which he was interested as aforesaid, became and were much depreciated and lessened in value, to wit, in the value of 50*l.*, on and in respect of each of such shares, and divers persons had believed, and still did believe, that the plaintiff had little or no right to the said shares, and that the said mine could not lawfully be worked or used for the benefit of the plaintiff ; and the plaintiff had been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done ; and the plaintiff had been otherwise hindered and prevented from gaining, acquiring, or deriving profits, emoluments, benefits, and advantages which otherwise would have arisen and accrued to him from the same ; and also, by reason of the premises aforesaid, the plaintiff had been and was otherwise much damnified and injured.

A verdict having been obtained for the plaintiff on this declaration, damages 5*l.*,

Talfourd, Serjt., obtained a rule *nisi* to arrest the judgment, on the ground that there was no allegation or proof of special damage, and that without such allegation and proof an action

for disparagement of the plaintiff's title did not lie. *Law v. Harwood*, Cro. Car. 140; *Sir W. Jones*, 196; *Rowe v. Roach*, 1 M. & S. 304; *Bois v. Bois*, 1 Lev. 134.

He also objected that the innuendo in the declaration was too large; but upon this point the court pronounced no opinion.

Bompas, Serjt., *Erle*, *Cowder*, and *Butt* showed cause. This is an action not so much for defaming the plaintiff's title to mining shares, as for injuring him in his business and means of getting his livelihood; and for defamation of that kind an action lies without any allegation or proof of special damage. The plaintiff alleges that by means of the premises he was injured in his rights; that his shares became depreciated; that divers persons believed he had no right to them; that the mines could not be worked for his benefit; that he was hindered from selling his shares in the mine and working the same in so beneficial a manner as he otherwise would have done, and was prevented from gaining divers profits which otherwise would have accrued to him. It is to be observed, too, that the injury complained of is a printed libel, not a mere oral slander. Now, when persons are defamed, vituperative expressions in writing are actionable, which would not be actionable if merely spoken. *Thorley v. Lord Kerry*, 4 Taunt. 355; *Bell v. Stone*, 1 Bos. & P. 331. And there is no reason why the same distinction should not be applied to defamation of title. The writing is permanent and pervading; the speech is fleeting and local. At all events, it is sufficient if the words in themselves import damage to the plaintiff in his estate. Accordingly, in *Bois v. Bois*, 1 Lev. 134, which was an action on the case for calling a widow, who held an estate while sole and chaste, a whore, falsely and maliciously, with intent to oust her of her estate, and saying he would oust her thereof; and at another time calling her a whore: after verdict for plaintiff on the issue not guilty, it was moved in arrest of judgment that, no special damage being laid, the words were not actionable. But by the court: "They import damage by themselves in this case, in respect of her estate; as for calling a man a thief, an action lies without special damage, because the words imply it in themselves." But for the last words spoken at another time, which are not actionable in themselves, and the damage being entire, the judgment was therefore arrested till the matter be examined, whether the dam-

ages were given entire or not. So in *Pennyman v. Rabanks*, Cro. Eliz. 427, in an action on the case for slandering the plaintiff's title to J. S., who was to buy the plaintiff's land, the words, "I know one that hath two leases of his land, who will not part with them at any reasonable rate," were held actionable; and no special damage appears to have been alleged. In *Bold v. Bacon*, Cro. Eliz. 346, it was alleged that, by reason of the words spoken by the defendant, none would buy the plaintiff's land; but no damage was alleged by the loss of any specific purchaser. Indeed, in many cases the immediate effect of the calumny may be to prevent any person from thinking of a purchase. But in *Lowe v. Harewood* the language as stated in *Croke* was not of so mischievous a nature; and though in *Rowe v. Roach* the plaintiff did allege special damage, there was no decision that he was bound to do so. On the other hand, in *Millman v. Pratt*, 2 B. & C. 486, an action for slander of title, there was no special damage alleged. In *Hargrave v. Le Breton*, 4 Burr. 2422, it was only decided that malice, express or implied, must appear; while in *Hartley v. Herring*, 8 T. R. 130, in an action for consequential damage from slander, imputing incontinence to the plaintiff, it was held enough to state that he was employed to preach to a dissenting congregation at a certain licensed chapel; that he derived considerable profit from his preaching; and that, by reason of the scandal, "persons frequenting the chapel refused to permit him to preach there, and had discontinued giving him the profits which they usually had and otherwise would have given," without saying who those persons were or by what authority they excluded him, or that he was a preacher duly qualified according to the 10 Anne, c. 2. In *Cook v. Batchellor*, 3 B. & P. 150, the defamation was oral, and only injurious to the plaintiffs in the way of their trade. An allegation of special damage was therefore essential to the action.

Talfourd, *Barstow*, and *Rowe*, in support of the rule. With the exception of *Millman v. Pratt*, there is no instance of slander of title without allegation of special damage; there, however, the property was actually put up to sale; it was alleged that persons desirous of purchasing were prevented by the libel from bidding; and the decision of the court turned on a point of variance. But in *Lowe v. Harewood* the court said that the declaration was not good, and so the judgment was erroneous, because the action

is not maintainable without showing special prejudice, any more than for calling one "whore" or "bastard," without showing special cause of temporal damage; and it was not like words spoken which imply slander and temporal loss, as "thief," and "bankrupt," and such like; but slandering one's title did not import in itself loss, without showing particularly the cause of loss by reason of the speaking the words, as that he could not sell or let the lands; but, being general words, they were not sufficient.

The distinction between written and oral defamation does not apply to slander of title; there is no question in such a case of feelings more or less wounded, but of mere pecuniary loss; and a printed assertion is not likely to occasion greater loss than a spoken one.

Nor is this a libel against the plaintiff in the way of his livelihood. In order to constitute such a libel there must be an assertion, first, concerning the individual, and, secondly, concerning him in the way of his trade. It is not sufficient that the defendant has spoken of the individual only, or of his trade only: it must be of the individual in the way of his trade. In *Savage v. Robery*, 2 Salk. 694, the plaintiff declared that he was a trader, and that the defendant said of him, "You are a cheat, and have been a cheat for divers years." Upon the first motion, Holt, C. J., held, that the words must be understood of his way of living, and that it needed no *colloquium*. But Pasch. 10 W. 3, *mutata* opinion, judgment was arrested. In *Tasburgh v. Day*, Cro. Jac. 484, in an action for slander of title, the court held that it must be averred that the plaintiff was in actual treaty for the sale of the estate, and that he received special damage. *Gerrard v. Dickenson*, Cro. Eliz. 197, and *Manning v. Avery*, 3 Keb. 153, are in confirmation of the same principle.

Cur. adv. vult.

TINDAL, C. J. In this case a verdict having been found for the plaintiff at the trial of the cause, with 5*l.* damages, a motion has been made to arrest the judgment on the ground that the declaration does not state any legal cause of action; and we are of opinion that this objection is well founded, and that the judgment must be arrested.

This is not an ordinary action for defamation of the person, by the publication of slander, either oral or written, in which form

of action no special damage need either be alleged or proved, the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons as share-owners in a certain mine, for an account and an injunction, had been granted by the Vice-Chancellor, and that persons duly authorized had arrived in the workings." The publication, therefore, is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine. And the objection taken is, that the plaintiff, in order to maintain this action, must show a special damage to have happened from the publication, and that this declaration shows none.

The first question, therefore, is, Does the law require in such an action an allegation of special damage? And, looking at the authorities, we think they all point the same way. The law is clearly laid down in Sir W. Jones, 196 (*Lowe v. Harewood*). "Of slander of title, the plaintiff shall not maintain action unless it was *re vera* a damage, *scil.*, that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the bar, viz., Sir John Tasburgh *v. Day*, Cro. Jac. 484, and Manning *v. Avery*, 3 Keb. 153, the case of Cane *v. Golding*, Style's Rep. 169, 176, furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz., "His right and title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *false et malitiose*, and that he was likely to sell and was injured by the words; and that by reason of speaking the words he could not recover his titles. After verdict for the plaintiff, there was a motion in arrest of judgment; and Rolle, C. J., said, "There ought to be a scandal and a particular damage set forth, and there is not here;" and upon its being moved again and argued by the judges, Rolle, C. J., held, that the action did not lie, although it was alleged that the words were spoken *false et malitiose*, for "the plaintiff ought to have a special cause; but that the verdict might supply; but

the plaintiff ought also to have showed a special damage, which he hath not done, and this the verdict cannot supply. The declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;” and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff’s title. This action is ranged under that division of actions in the Digests and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, Has there been such a special damage alleged in this case as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (Cro. Eliz. 197, Cro. Car. 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale. R. 1. Rolle, 244. Admitting, however, that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, “that the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done.” And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action

is not founded on the words spoken or written, but upon the special damage sustained.

It has been argued in support of the present action that it is not so much an action for slander of title, as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else. The bill in chancery, out of which the publication arose, is filed by Tollervey, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business or occupation or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended, affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words or writing or print; but that it rests on the nature of the action itself, namely, it is an action for special damage actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication, appears to us to make no other difference than that it is more widely and permanently disseminated, and in consequence more likely to be serious than

where the slander of title is by words only, but that it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion that the action is not maintainable, and that the judgment must be arrested; and, consequently, it becomes unnecessary to inquire whether the innuendo laid in the declaration is more large than it ought to have been.

We therefore make the rule for arresting the judgment

Absolute.

The doctrine of *Malachy v. Soper*, that a misrepresentation of the plaintiff's present title, though often called slander of title, stands upon the same footing with other actions for false representations, is well settled. See *Gutsole v. Mathers*, 1 Mees. & W. 501; *Brook v. Rawl*, 4 Ex. 524; *Pater v. Baker*, 3 Com. B. 831; *Kendall v. Stone*, 5 N. Y. 14; *Like v. McKinstry*, 4 Keyes, 397; *Hill v. Ward*, 13 Ala. 310; *Paull v. Halferty*, 63 Penn. St. 46; *Swan v. Tappan*, 5 Cush. 104.

That this is true as to the necessity of proving special damage, has been conceded from early times. *Law v. Harwood*, Croke Car. 140. But the language of the judges in certain recent cases may convey the impression that the doctrine of implied malice belongs to actions of this kind as well as to actions for personal defamation; though the cases themselves do not decide the point. *Wren v. Weild*, Law R. 4 Q. B. 730; *Steward v. Young*, Law R. 5 C. P. 122; *Hill v. Ward*, 13 Ala. 310.

Before considering these cases, it is to be remembered that in actions for defamation by slander or libel the law raises a presumption of malice in the defendant, and casts the burden of proof upon him to relieve himself. In actions for false representations, however, as we have seen in the note to *Pasley v. Freeman*, the burden rests upon the plaintiff of proving that the

defendant made the statement fraudulently as well as falsely; and the question now is, to which of these cases the action of slander of title belongs.

In *Wren v. Weild*, *supra*, it was merely decided, as it had often been decided before, that no action lies against a party for falsely asserting a claim to property, by which the plaintiff loses a sale. In the course of the judgment, Mr. Justice Blackburn says: "There is a well-known action for slander of title, where an unfounded assertion that the owner of real property has not title to it — if made under such circumstances that the law would *imply malice*, or if express malice be proved, and special damage is shown . . . — is held to give a cause of action." The case, however, explains this language, as we shall see, and removes the impression it might at first convey.

Steward v. Young, *supra*, was a case of the same kind; and Bovill, C. J., said: "I think the occasion of the speaking the alleged slander was one which brought it within the rule as to *privileged communications*. . . . The *prima facie* presumption of malice being rebutted, the *onus* of proving malice lay upon the plaintiff." And the language of the other judges in this case, and of the court in *Hill v. Ward*, *supra*, is much to the same effect.

The decision of Lord Ellenborough in *Pitt v. Donovan*, 1 Maule & S. 639,

is often referred to; but though that distinguished judge there says that the jury must arrive at their conclusion through the medium of malice or no malice, he so explains his meaning as to show that he did not use the term in the sense in which it is employed in the law of slander and libel. The question was, whether the defendant's honesty in warning against the plaintiff's title was the proper criterion of liability; and he held that it was. "If," said he, "what the defendant has written be most untrue, but, nevertheless, he believed it, if he was acting under the most vicious of judgments, yet if he exercised that judgment *bona fide*, it will be a justification in this case." And again: "The question, then, distinctly and substantively is, whether, in the communication which he made, he acted *bona fide*. I am aware that there are many things reprehensible in the letters, but they are no slander of the title if he believed them."

Now, it is to be remembered that, in the action for defamation of character, it is no defence that the party believed that what he said of the plaintiff was true. *Campbell v. Spottiswoode*, 3 Best & S. 769. The question in *Pitt v. Donovan*, however, did not involve the matter of the burden of proof, and the point was not mentioned in the case.

The earliest case that we have found in which malice is spoken of as essential to this action is *Goulding v. Herring*, 3 Keb. 141, pl. 11, A D. 1685. It was there agreed that the defendant claimed title, yet if it were found by verdict to be done *malitiose*, the action lay; but if upon the evidence any probable cause of claim appeared, it ought not to be found *malitiose*.

Gerard v. Dickenson, 4 Coke, 18, tried about a hundred years earlier,

seems decisive against this connection of malice with actions for slander of title. In that case, the defendant had prevented the sale of a lease by the plaintiff, by representing to the intended purchaser that she (the defendant) held a lease of the premises for ninety years. The declaration alleged that the lease of the defendant was a forgery, and *that she knew it*. The defendant traversed the knowledge of the forgery. The court resolved that if the defendant had merely set up a claim to the premises, though the claim were false, no action lay; but because it was alleged in the declaration that the defendant knew of the intended making of the lease, and also knew that her own lease was forged and counterfeited, and yet, against her own knowledge, had affirmed and published that it was a good lease, the action was maintainable. The bar was held insufficient, for the defendant's knowing of the forgery was not traversable; "as in an action upon the case because the defendant's dog has bit the plaintiff's cattle, *ipse sciens canem suum ad mordendas oves consuetum*, the *sciens* is not traversable, but ought to be proved in evidence upon the general issue, for *sciens* is no direct allegation, nor ever alleged in any place, so that it is not traversable nor triable." The editor of Coke, in a note to this point, says that the general issue is in fact a traverse of the *sciens*, for unless, in the case put, the plaintiff prove that the defendant knew his dog to be accustomed to bite sheep, his cause of action falls to the ground.

Here, then, is a case, often cited as a leading authority, in which no mention is made of malice, and the point decided that it is a part of the plaintiff's case to prove that the slander was false to the

defendant's knowledge, and that it was uttered for the purpose of injuring the plaintiff.

Mildway's Case, 1 Coke, 175 *a*, a few years earlier, is to the same effect. In that case, which was for slander of title, the defendant had published that a third person had a lease of the plaintiff's land for a thousand years; but the lease being void in law, it was held, in the language of the report, that, forasmuch as the defendant hath taken upon him the knowledge of the law, and, meddling with a matter which did not concern him, had published and declared that Oliffe had a good estate for a thousand years, in slander of the title of Mildway, and thereby had prejudiced the plaintiff, as appears by the plaintiff's declaration; for this reason the judgment given for the plaintiff was affirmed in the writ of error; *et ignorantia legis non excusat*. That is, the defendant had made a statement false to his own knowledge, since he was bound to know the law; and, having virtually admitted this by his pleading, the plaintiff's case was made out. See *Smith v. Spooner*, 3 Taunt. 246, per Lawrence, J.

If it should be said that these cases are not important because the doctrine of implied malice is not mentioned in any of the cases of slander in the Reports of Coke, and is apparently of subsequent growth, the reply is, that there are many cases in Coke's time holding that certain classes of words are actionable *per se*, the effect of proving which words was, of course, to cast the burden of proof upon the defendant to justify the speaking of them. Now, it is plain that nothing was added when it was afterwards said that malice is the gist of the action; for the courts always said that actionable words implied malice.

Malice is therefore a superfluous factor in the case; and the cases of actionable words in Coke's Reports are the same in substance as the modern cases. But in slander of title, where the words were not actionable *per se*, it was not enough to prove the words alone; the burden was still upon the plaintiff to prove that the words were published with a *knowledge of their falsity*, and to the special damage of the plaintiff.

The modern cases, decided since the doctrine of implied malice was ingrafted upon the law of slander and libel, also show that the burden of proof is upon the plaintiff to establish the malice of the defendant. *Smith v. Spooner*, 3 Taunt. 246; *Pater v. Baker*, 3 C. B. 831; *Stark v. Chetwood*, 5 Kans. 141; *McDaniel v. Baca*, 2 Cal. 326. See also *Hargrave v. Le Breton*, 4 Burr. 2422; *Wren v. Weild*, Law R. 4 Q. B. 730; *Kendall v. Stone*, 2 Sandf. 269; s. c. 5 N. Y. 14.

In *Smith v. Spooner*, *supra*, the defendant had stopped the sale of the plaintiff's leasehold premises, asserting that he could not make title to them. It was objected under the general issue that the plaintiff could not recover upon the evidence, since there was no proof of malice in the defendant; and the objection was sustained. Lawrence, J., said: "It is not necessary to plead specially; it is for the plaintiff to prove malice, which is the gist of the action, and is a part of the declaration important to be proved by the plaintiff."

Pater v. Baker, *supra*, is to the same effect. The action was against a surveyor of highways for words by which he prevented the sale by the plaintiff of certain unfinished houses. "It seems to have been admitted," said Wilde, C. J., "and, indeed, it could not well have been denied, that proof of actual malice

was requisite to sustain the action. The declaration is framed with reference to that view of the law." Maule, J., said directly that, unless the plaintiff in actions for slander of title showed falsehood and malice, and an injury to himself, he had no case to go to the jury.

The case of *Wren v. Weild*, above referred to (p. 54), though in the extract given the court speak of implied malice, is also in reality opposed to the notion that this action of slander of title is allied to the action of slander. The opinion shows that by "implied malice" was meant circumstances to be *proved by the plaintiff* from which the inference of malice could be drawn. "If," said the court, "the plaintiffs had given evidence on which the jury might properly find that the defendant made the communication to the intended purchasers *mala fide*, and without any intention to institute legal proceedings at all against the purchasers,¹ . . . we are inclined to think that it would have been proper to leave that evidence to the jury in support of the plaintiff's allegation that the defendant's letter was false and malicious; the question whether that is enough without an express allegation of knowledge or want of reasonable and probable cause being on the record." And again: "We think the action could not lie, *unless the plaintiffs affirmatively proved* that the defendant's claim was not a *bona fide* claim in support of a right which, with or without cause, he fancied he had; but a *mala fide* and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without foundation."

In this country the same decision has been reached in *Kendall v. Stone*, 2 Sandf. 269; in *McDaniel v. Baca*, 2 Cal. 326; and in *Stark v. Chetwood*, 5 Kans. 141.

Kendall v. Stone was, indeed, reversed in the Court of Appeals (5 N. Y. 14), but not on this point. There was no doubt, the court observed (2 Sandf. 284), that sufficient words and damage (upon which last point the case was reversed) had been shown to sustain the action, provided malice had been established. "This was a question of fact, and was fairly submitted to the jury. The whole charge proceeds on the ground, that if the defendant honestly believed what he communicated to Wheeler, and cautioned him in a fair spirit, he was not liable; but if he made the communication with a different spirit, to prevent the sale to Wheeler, so as to enable the defendant to get the plaintiff's property himself for less than its value, or from any other impure or corrupt motive, then he must be deemed to have spoken the words maliciously. We see nothing exceptionable in this view of the charge. . . . *The plaintiff assumes the burden of proving* not only special loss, but actual malice; not that malice which the law implies in ordinary actions for defamation of the person, but actual, express malice."

In *McDaniel v. Baca*, *supra*, the court below had instructed the jury that "where a person injuriously slanders the title of another, malice is presumed;" and this instruction was pointedly overruled.

If these cases were not conclusive that the doctrine of the presumption of

¹ The defendant had warned the public against purchasing certain machines of the plaintiffs, alleging them to be infringements of his patent, and threatening the purchasers with legal proceedings.

malice in actions for slander has no place in actions for slander of title, it might be shown to be highly probable from the fact that the connection of malice with the law of slander is, as we have seen, to be traced to the canon law. When slander was a matter of cognizance in the spiritual courts, *malitia* was considered essential to the action; but slander of title was always a temporal cause, and therefore was probably never cognizable in the spiritual courts. See *Palmer v. Thorpe*, 4 Coke, 20, where it was held that to defamation in the ecclesiastical courts there were three incidents: 1. That it concerns matter merely of ecclesiastical cognizance, as for calling one heretic, adulterer, &c.; 2. That it concerns matter merely spiritual; for if it relate to any thing determinable at common law, the ecclesiastical judge shall not have cognizance thereof; 3. That the party cannot sue there for damages, but only for punishment of sin.

This will probably account for the fact that in all the English cases there has never been an express decision that the speaking of injurious words of one's title raises a presumption of malice. Had slander of title come from the spiritual courts, it is altogether likely that the action would have been assimilated to the action for defamation. But the fact that the action has from early times been called slander of title has, no doubt, given rise to the use of the term "malice," and caused the courts sometimes to say that malice is the gist of the action. This malice, however, seems merely to be a knowledge of the falsity of the words, coupled with an intention to injure the plaintiff, or to prevent him from making a bargain. If the words are spoken with an honest motive to protect or save the rights of

the defendant, though perhaps he may not have good grounds to support his claim (see *Wren v. Weild*, *supra*), there is no malice; and the action fails.

The action for slander of title is therefore more nearly allied to actions for false representations, like *Pasley v. Freeman*; and it is safe to say that a declaration framed after the manner of declarations in those cases would be consistent with evidence of slandering the plaintiff's title.

Originally actions for slander of title were brought only for words affecting the title to the plaintiff's real property; but this was perhaps owing to the circumstance that in early times personal property was regarded as of but little importance, and actions concerning it were infrequent. But the leading case shows that the action has in modern times been extended to matters concerning personalty. See also *Wren v. Weild*, Law R. 4 Q. B. 730; *Snow v. Judson*, 38 Barb. 210.

There has been some disposition also to confine this action to words affecting the plaintiff's title. See *Young v. Macrae*, 3 Best & S. 264, 269, where Blackburn, J., in the course of the argument, says: "Is there any case where an action has been maintained for slander, written or verbal, of goods, unless where the slander is of the title to them, and special damage has resulted?" And Cockburn, C. J. says: "Not one of us recollects such an action in the course of his experience." But on giving judgment, the Chief Justice said: "I am far from saying that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is

averred, an action might not be maintained. For, although none of us are familiar with such actions, still we can see that a most grievous wrong might be done in that way, and it ought not to be without remedy." But it was held that the declaration had not alleged facts to bring the case within such a rule.

There is a case, however, in which Lord Kenyon held that it was actionable, in connection with proof of special damage, to publish of a newspaper that it was "lowest in circulation." *Heriot v. Stuart*, 1 Esp. 437. See also *Tobias v. Harland*, 4 Wend. 537. And if we are correct in supposing that the doc-

trine of presumption of malice has nothing to do with these cases, and that the burden of proving not only actual damage, but the falsity and *mala fides* of the words, lies upon the plaintiff, there is no good reason for a distinction between (for example) words concerning the plaintiff's solvency and words concerning the quality of his sugar. If the utterance of injurious words, falsely and fraudulently, in the one case gives a cause of action, it should in the other. The only ground for any distinction must have arisen from a mistaken notion, that to admit the action would carry with it a presumption of malice in favor of the plaintiff.

WARREN MARSH and Another v. FREDERICK BILLINGS and Others.

(7 Cush. 822. Supreme Court, Massachusetts, March Term, 1851.)

Fraudulent Use of Badge. M. agreed with S., the lessee of the Revere House, to keep good carriages, horses, and drivers, on the arrival of certain specified trains, at a railroad station, to convey passengers to the Revere House, and in consideration thereof, S. agreed to employ M. to carry all the passengers from the Revere House to the station, and authorized him to put upon his coaches and the caps of his drivers, as a badge, the words "Revere House." A similar agreement, previously existing between S. and B., had been terminated by mutual consent; but B. still continued to use the words "Revere House" as a badge on his coaches and on the caps of his drivers, although requested not to do so by S.; and his drivers called "Revere House" at the station, and diverted passengers from M.'s coaches into B.'s. In an action on the case brought by M. against B., for using said badge and diverting passengers, it was held that M., by his agreement with S., had an exclusive right to use the words "Revere House," for the purpose of indicating that he had the patronage of that house for the conveyance of passengers; that if B. used those words for the purpose of holding himself out as having the patronage and confidence of that establishment, and in that way to induce passengers to go in his coaches rather than in M.'s, this would be a fraud on the plaintiff, and a violation of his rights, for which this action would lie, without proof of specific damage; and that M. would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that he had sustained, and not merely for the loss of such passengers as he could prove to have been actually diverted from his coaches to the defendant's.

THIS was an action of trespass on the case. The declaration contained two counts, the first of which stated that the plaintiffs, on the 16th of January, 1849, and ever since, had purchased for a valuable consideration, and were possessed of, the sole and exclusive right and privilege of representing and acting for Paran Stevens, the lessee of the hotel or public-house in Boston known as the Revere House, at the station of the Boston and Worcester Railroad Company in Boston, in and about the carriage and transportation for hire of such passengers arriving at the station as should require the services and aid of hackmen and hacks authorized by Stevens to act for and represent him in this behalf, to transport them and their baggage from the station to the Revere House, and of the exclusive right of using, wearing, and placing upon their carriages and servants, stationed at said station, the name, badge, and designation of "Revere House;" and that, to enable them to exercise their said rights and privileges beneficially, the plaintiffs had been put to great outlay and expense, and had bought and maintained two carriages at a great expense, to wit, the sum of four thousand dollars, and had hired and kept divers servants at great wages; and, at the time of the committing by the defendants of the grievances complained of, were used and accustomed to obtain and transport for hire, from the station to the Revere House, a great number of such passengers and their baggage; and by reason of the transportation of such passengers and baggage great profits and advantages had accrued, and still ought to accrue, to the plaintiffs. Yet the defendants, well knowing the premises, but contriving and unjustly intending to injure the plaintiffs in the exercise of their said business or occupation, and to deprive them of great parts of their said profits and advantages,* without the license or consent of the plaintiffs, or of Stevens, and against the will of the plaintiffs, and of Stevens, did unlawfully, on the 16th of January, 1849, and on divers other days since that day, and before the purchase of this writ, keep and maintain, and caused to be kept and maintained, at said station a large number of carriages and servants, with the name, badge, or designation of "Revere House" marked, placed, or worn upon them and each of them, in imitation of and as the name, badge, and designation worn and used by the plaintiffs as aforesaid, and in order to denote to such passengers that said coaches and servants were authorized by

Stevens to transport them and their baggage from the station to the Revere House, and did knowingly and deceitfully represent, and cause their said servants to represent, to such passengers that said coaches and servants were authorized and placed by Stevens at the station, to transport for hire said passengers and their baggage from the station to the Revere House; by means of which a great number, to wit, five hundred, of such passengers were induced to enter the defendants' carriages with their baggage, and to desert and leave the carriages of the plaintiffs, and the plaintiffs thereby lost the profits and advantages which would otherwise have accrued to them from transporting for hire said passengers and their baggage from the station to the Revere House, and were subjected to great loss in their said business or occupation.

The second count was precisely like the first as far as the star (*) above, and then alleged that the defendants did unlawfully, on the 16th of January, 1849, and on divers other days since that day, and before the purchase of this writ, interfere, and cause their servants to interfere, with the plaintiffs, in the exercise of their said business or occupation, and in the obtaining and transportation by the plaintiffs of such passengers and their baggage from the station to the Revere House, insomuch that many passengers, to wit, five hundred, who were then and there about to enter the plaintiffs' carriages, were prevented from so doing, and the plaintiffs were thereby prevented from obtaining and transporting for hire such passengers and their baggage in such plenty as they would otherwise have done, and from realizing the profits and advantages which ought to have accrued to them in their said business and occupation, and were therein subjected to great loss.

At the trial before Bigelow, J., in the Court of Common Pleas, the plaintiffs, to prove their case, called as a witness Paran Stevens, the lessee of the Revere House, who testified that on the first day of May, 1849, he made a verbal agreement with the plaintiffs, by which they agreed to keep coaches at the station of the Boston and Worcester Railroad in Boston, to convey passengers arriving at the station by the "long trains," who might desire to go to the Revere House, and further agreed to keep good horses and coaches, and to employ first-rate drivers, to do the work of conveying passengers, to the acceptance of the pas-

sengers and of Stevens ; in consideration of which he agreed to employ the plaintiffs to convey all passengers who might wish to go from the Revere House to the station, and authorized the plaintiffs to put on their coaches and on the caps of their drivers, as a badge, the words " Revere House." He further testified that a similar agreement had existed between him and the defendants, from the time when he first opened the Revere House, until the 1st of May, 1849, when it was terminated by him with the assent of the defendants, because the defendants did not do the work to his satisfaction ; and that the defendants, under this agreement, had placed the words " Revere House " on their coaches and on the caps of their drivers.

It further appeared in evidence that after the 1st of May, 1849, and during the times alleged in the plaintiffs' writ, the defendants continued to carry the words " Revere House " on their coaches and on the caps of their drivers ; that their coaches and drivers, so marked, were kept at the station of the Boston and Worcester Railroad, and on the arrival of the " long trains " their drivers were in the constant habit of calling out " Revere House," in loud tones, in the presence and hearing of the passengers by said trains. It also appeared that some time in July, 1849, Stevens requested one of the defendants to discontinue the use of the words " Revere House " on their coaches and on the caps of their drivers ; but that he refused so to do, saying he had a right to use them.

There was also some evidence that the defendants by their agents on one or more occasions stated to persons desiring conveyance to the Revere House, that they were the agents employed by the " Revere House," or by Mr. Stevens, to convey passengers, and that the plaintiffs were not, or words to that effect, by means of which statements some passengers were diverted from the coaches of the plaintiffs, and induced to go in the coaches of the defendants. Upon this point, however, the evidence was contradictory. One person in the employ of the defendants, called as a witness by the plaintiffs, testified that on one occasion he induced three persons to leave the coach of the plaintiffs and go in the defendants' coach, by stating to them that his coach was the regular coach, and that they had got into the wrong coach. The plaintiffs also offered evidence that the defendants, during the time alleged in the plaintiffs' writ, carried

large numbers of passengers from the station to the Revere House.

The plaintiffs, on the foregoing evidence, contended that they had an exclusive right to the use of the words "Revere House" on their coaches and on the caps of their drivers; that these words were in the nature of trade-marks, and that their action would lie, on showing that the defendants had used these words in the manner above stated.

But the judge instructed the jury that no person had the legal right to claim the exclusive privilege of conveying passengers from the station of the Boston and Worcester Railroad to the Revere House; that any person, who saw fit to engage in it, had a right to carry on the business, and to indicate, by suitable signs on his coaches, by badges on the caps of his drivers, and by calling at the station, in the hearing of passengers, the place to and from which he conveyed passengers; that the plaintiffs in this case could not recover damages of the defendants, merely by showing that the defendants had on their coaches, and on the caps of their drivers, the words "Revere House," and that they had called out "Revere House," in the hearing of passengers in the station, and thereby obtaining the conveyance of passengers from the station to the Revere House. But that if, on the whole evidence before the jury, the burden of proof being on the plaintiffs, the jury were satisfied that the plaintiffs were authorized by Stevens to hold themselves out as his agents at the station, for the transportation of passengers thence to the Revere House, and the defendants knowing this, by means of false representations that they were the agents of Stevens for this purpose, or that the plaintiffs were not, induced persons to go by the coaches of the defendants, instead of going by the coaches of the plaintiffs, and that thereby passengers were actually diverted from the plaintiffs' coaches, then the plaintiffs might recover of the defendants such damages as the plaintiffs had shown they had sustained in consequence of such false representations, and the loss of passengers thereby occasioned.

The jury returned a verdict for the plaintiffs, assessing damages in the sum of seventy-five cents, and the plaintiffs excepted to the instructions of the judge.

W. Sohier, for the plaintiffs. *W. Brigham*, for the defendants.

The opinion was delivered at March term, 1852.

FLETCHER, J. This is an action on the case, sounding in tort. The principle involved in the merits of the case is one of much importance, not only to persons situated as the plaintiffs are, but also to the public. But this principle is by no means novel in its character, or in its application to a case like the present. It is substantially the same principle which has been repeatedly recognized and acted on by courts, in reference to the fraudulent use of trade-marks, and regarded as one of much importance in a mercantile community. Vast numbers, no doubt, of the strangers who are continually arriving at the stations of the various railroads in the city have a knowledge of the reputation and character of the principal hotels, and would at once trust themselves and their luggage to coachmen supposed to have the patronage and confidence of these establishments. Not only much wrong might be done to individuals situated like the plaintiffs, but great fraud and imposition might be practised upon strangers, if coachmen were permitted to hold themselves out falsely as being in the employment, or as having the patronage and countenance, of the keepers of well known and respectable public-houses. It was said, in behalf of the defendants, that the lessee of the Revere House had no exclusive right to convey passengers from the Worcester Railroad to his house, nor had he the exclusive right to put upon his coaches or the badges of his servants the words "Revere House," and could confer no such exclusive right on the plaintiffs; that the defendants, in common with all other citizens, have a right to convey passengers from the Worcester Railroad to any public-house, and have a right to indicate their intention so to do, by marks on their coaches and on the badges of their servants.

This may all be very true, but it does not reach the merits of the case. The plaintiffs do not claim the exclusive right of using the words "Revere House;" but they do claim the exclusive right to use those words in a manner to indicate, and for the purpose of indicating, the fact that they have the patronage and countenance of the lessee of that house, for the purpose of transporting passengers to and from that house, to and from the railroads. The plaintiffs may well claim that they had the exclusive right to use the words "Revere House," to indicate the fact that they had the patronage of that establishment; because the evidence shows that such was the fact, and that the plaintiffs, and

they alone, had such patronage of that house, by a fair and express agreement with the lessee. For this privilege they paid an equivalent in the obligations into which they entered. The defendants, no doubt, had a perfect right to carry passengers from the station to the Revere House. And they might perhaps use the words "Revere House," provided they did not use them under such circumstances and in such a manner as to effect a fraud upon others.

The defendants have a perfect right to carry on as active and as energetic a competition as they please, in the conveyance of passengers to the Revere House or any other house. The employment is open to them as fully and freely as to the plaintiffs. They may obtain the public patronage by the excellence of their carriages, the civility and attention of their drivers, or by their carefulness and fidelity, or any other lawful means. But they may not by falsehood and fraud violate the rights of others. The business is fully open to them, but they must not dress themselves in colors, and adopt and wear symbols which belong to others.

The ground of action against the defendants is not that they carried passengers to the Revere House, or that they had the words "Revere House" on the coaches and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence, of the lessee of the Revere House, in violation of the rights of the plaintiffs. The jury would have been well warranted by the evidence in finding that the defendants used the words "Revere House," not for the purpose of indicating merely that they carried passengers to that house, but for the purpose of indicating, and in a manner and under circumstances calculated and designed to indicate, that they had, and to hold themselves out as having, the patronage of that establishment. Upon the evidence in the case, the jury should have been instructed, that if they were satisfied by the evidence that the plaintiffs had made the agreement with the lessee of the Revere House, as stated, they had, under and by virtue of that agreement, an exclusive right to use the words "Revere House," for the purpose of indicating and holding themselves out as having the patronage of that establishment for the conveyance of passengers; and that if the defendants used those words, in the

manner and under the circumstances stated in the evidence, for the purpose of falsely holding themselves out as having the patronage and confidence of that house, and in that way to induce passengers to go in the defendants' coaches, rather than in those of the plaintiffs, that would be a fraud on the plaintiffs, and a violation of their rights, for which this action would lie, without proof of actual or specific damage; that if the jury found for the plaintiffs, they would be entitled to such damages as the jury, upon the whole evidence, should be satisfied they had sustained; that the damage would not be confined to the loss of such passengers as the plaintiffs could prove had actually been diverted from their coaches to those of the defendants; but that the jury would be justified in making such inferences, as to the loss of passengers and injury sustained by the plaintiffs, as they might think were warranted by the whole evidence in the case.

Though the instructions, as given, may have been intended to conform substantially to these views, yet, upon the whole, it seems to the court that the principles of the law, upon which the rights of the parties were to be determined, were not stated with all that distinctness and accuracy which the practical importance of the case requires.

The principles of law which govern this decision are so fully settled by numerous decisions, that it seems unnecessary to go into any particular examination of authorities, but it is sufficient merely to refer to some leading cases. *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Blofeld v. Payne*, 4 B. & Ad. 410; *Morison v. Salmon*, 2 Man. & Gr. 385; *Knott v. Morgan*, 2 Keen, 213; *Croft v. Day*, 7 Beavan, 84; *Rodgers v. Nowill*, 5 Man., G. & S. 109; *Bell v. Locke*, 8 Paige, 75; *Stone v. Carlan*, 13 Law Reporter, 360.

New trial ordered.

SYKES v. SYKES *et al.*

(8 Barn. & C. 541. King's Bench, England, Michaelmas Term, 1824.)

Trade-mark. Where a manufacturer had adopted a particular mark for his goods, in order to denote that they were manufactured by him, *held*, that an action was maintainable by him against another person who adopted the same mark for the

purpose of denoting that his goods were manufactured by the plaintiff, and who sold the goods so marked as and for goods manufactured by the plaintiff.

The declaration stated that defendant sold the goods as and for goods manufactured by the plaintiff. It appeared that the persons who bought the goods of the defendant knew by whom they were manufactured, but still that defendant used the plaintiff's mark, and sold the goods so marked, in order that his customers might resell them, as in fact they did, as and for goods manufactured by the plaintiff; *held*, that this evidence supported the declaration.

CASE. The declaration alleged that the plaintiff, before and at the time of committing the grievances complained of, carried on the business of a shot-belt and powder-flask manufacturer, and made and sold for profit a large quantity of shot-belts, powder-flasks, &c., which he was accustomed to mark with the words "Sykes Patent," in order to denote that they were manufactured by him, the plaintiff, and to distinguish them from articles of the same description manufactured by other persons; that plaintiff enjoyed great reputation with the public on account of the good quality of the said articles, and made great gains by the sale of them, and that defendants, knowing the premises, and contriving, &c., did wrongfully, knowingly, and fraudulently, against the will and without the license and consent of the plaintiff, make a great quantity of shot-belts and powder-flasks, and cause them to be marked with the words "Sykes Patent," in imitation of the said mark so made by the plaintiff in that behalf as aforesaid, and in order to denote that the said shot-belts and powder-flasks, &c., were of the manufacture of the plaintiff, and did knowingly, wrongfully, and deceitfully sell, for their own lucre and gain, the said articles so made and marked as aforesaid, *as and for* shot-belts and powder-flasks, &c., of the manufacture of the plaintiff. Whereby plaintiff was prevented from selling a great quantity of shot-belts, powder-flasks, &c., and greatly injured in reputation; the articles so manufactured and sold by the defendants being greatly inferior to those manufactured by the plaintiff. Plea, not guilty.

At the trial before Bayley, J., at the last Yorkshire assizes, it was proved that some years before the plaintiff's father obtained a patent for the manufacture of the articles in question. In an action afterwards brought for infringing the same, the patent was held to be invalid on account of a defect in the specification; but the patentee, and afterwards the plaintiff, continued to mark the articles with the words "Sykes Patent," in order to distin-

guish them as their manufactures. The defendants afterwards commenced business, and manufactured articles of the same sort, but of an inferior description, and sold them at a reduced price to the retail dealers. They marked them with a stamp resembling as nearly as possible that used by the plaintiff, in order that the retail dealers might, and it was proved that they actually did, sell them again, as and for goods manufactured by the plaintiff; but the persons who bought these articles from the defendants, for the purpose of so reselling them, knew by whom they were manufactured. It further appeared that the plaintiff's sales had decreased since the defendants commenced this business.

It was contended for the defendants that the plaintiff could not maintain this action, for that one of the defendants being named Sykes, he had a right to mark his goods with that name, and had also as much right to add the word "patent" as the plaintiff, the patent granted to the latter having been declared invalid. The learned judge overruled the objection, as the defendant had no right so to mark his goods *as and for* goods manufactured by the plaintiff, which is the allegation in the declaration.

It was then urged that the declaration was not supported by the evidence, for that it charged that the defendants sold the goods *as and for* goods made by the plaintiff; whereas the immediate purchasers knew them to be manufactured by the defendants. The learned judge overruled this objection also, and left it to the jury to say whether the defendants adopted the mark in question for the purpose of inducing the public to suppose that the articles were not manufactured by them but by the plaintiff; and they found a verdict for the plaintiff. And now

Brougham moved for a rule *nisi* for a new trial, and renewed the second objection taken at the trial, and contended that the facts proved did not support the declaration. The allegation [to conform to the evidence] should have been, not that defendants sold the goods *as and for* goods made by the plaintiff, but that they sold them to third persons, in order that they might be resold *as and for* goods manufactured by the plaintiff.

ABBOTT, C. J. I think that the substance of the declaration was proved. It was established most clearly that the defendants marked the goods manufactured by them with the words "Sykes Patent," in order to denote that they were of the genuine manu-

facture of the plaintiff; and although they did not themselves sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers for the express purpose of being resold as goods of the plaintiff's manufacture. I think that is substantially the same thing, and that we ought not to disturb the verdict.

Rule refused.

The only apparent difference between actions of the class represented by the above cases, and those like *Pasley v. Freeman*, is that where the plaintiff claims a trade-mark, there is no allegation that he was deceived by the defendant's misrepresentation. The representation is not made to the plaintiff, to induce him to act upon it, but to third persons, to whom the allegation of the deceitful intention must of course refer.

Where a *purchaser* claims to have been defrauded by the use of false marks by the seller, the action is precisely like that in *Pasley v. Freeman*; the plaintiff claims to have been himself deceived.

The action is grounded in fraud, and therefore fails without proof of the intention to deceive. The principal case, *Marsh v. Billings*; *Crawshay v. Thompson*, *supra*; *Rodgers v. Nowill*, 5 Com. B. 109; *Morison v. Salmon*, 2 Man. & G. 385. It is not enough, therefore, that the article or mark is an imitation of that used by the plaintiff, or even that it is the same thing; the goods must have been sold as of his manufacture. *Ib.*; *Singleton v. Bolton*, 3 Doug. 293.

In *Morison v. Salmon*, *supra*, there was a motion in arrest of judgment for the plaintiff on the ground that there was no direct allegation that the defendant represented the article sold by him to have been manufactured by the plaintiffs; but the motion was over-

ruled, not on the ground that such an allegation was unnecessary, but that the declaration was sufficiently specific. *Tindal, C. J.*, said, that if the declaration had stopped with alleging that the defendant had deceitfully and fraudulently prepared and made the article in question *in imitation* of that prepared and made by the plaintiffs, it would have failed to disclose a cause of action, the article not being patented. But there was a further allegation that the article was prepared and vended falsely, as material prepared and vended by the plaintiff. And this he and the other judges held to be a sufficient statement of a false representation by the defendant.

In *Singleton v. Bolton*, 3 Doug. 293, it appeared that the plaintiff's father had sold a medicine called "Dr. Johnson's Yellow Ointment;" and the plaintiff, after his father's death, continued to sell the medicine marked in the same way. The defendant also sold the medicine (which was not patented) with the same mark; and for that the action was brought. The defendant had judgment. Lord Mansfield said, that if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie. But here both the plaintiff and the defendant had been using the name of the original inventor; and there was no evidence that the defendant had sold it as of the plaintiff's preparation.

On the other hand, if the plaintiff allege fraud and deception by the defendant, it is no defence that the simulated article is of equal quality with that manufactured by the plaintiff. *Taylor v. Carpenter*, 2 Sand. Ch. 603; *Partridge v. Menck*, ib. 622; *Coats v. Holbrook*, ib. 586. In *Taylor v. Carpenter* and in *Coats v. Holbrook* the protection of a court of equity was given to aliens. "So far as the subject-matter of the suit was concerned," said the Chancellor, "there is no difference between citizens and aliens." Upon the question of infringement, Mr. Senator Spencer, formerly Chief Justice, said: "The right claimed by the complainant does not partake in any considerable, if in any, degree of the nature and character of a patent or copyright, as urged by the counsel for the defendant. He is at full liberty to manufacture and vend the same kind of thread to any extent he pleases, and whenever he chooses. He is only required to depend for his success upon his own character and fame."

In short, the question in these cases is not whether the plaintiff was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, or whether the article made and sold by the defendant under the former's trade-mark is an article of the same quality or value. The courts proceed upon the ground that the plaintiff has a valuable interest in the good-will of his trade or business; and that, having appropriated to himself a particular label, or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or that he carries on business at a particular place, he is entitled to protection against any attempts to pirate

upon his trade. *Partridge v. Menck*, 2 Sandf. Ch. 622, 625, *Walworth, Ch.*; *Newman v. Alvord*, 51 N. Y. 189; *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. 599.

In *Newman v. Alvord*, *supra*, the plaintiff had taken the name of the locality of his business, "Akron," as the chief part of his trade-mark; and it was contended by the defendants, who had adopted the same name, that, since the name was of a locality, the plaintiffs could have no exclusive right to it, so as to enable them to obtain an injunction for its infringement. But the court held that it was not necessary for the plaintiffs to have an absolutely exclusive right; the defendants had by deception sold his goods as those of the plaintiff, and that was sufficient to entitle the plaintiff to relief. (That one can acquire a trade-mark in the name of a locality, the following cases were cited: *Congress & E. Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291; *Seizo v. Provezende*, Law R. 1 Ch. 192; *Lee v. Haley*, Law R. 5 Ch. 155; *Wotherspoon v. Currie*, Law R. 5 H. L. 508. *Brooklyn White Lead Co. v. Masury*, 25 Barb. 417; and *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, were distinguished. See also *Candee v. Deere*, 54 Ill. 439.)

To obtain an injunction in chancery against the use of a trade-mark closely resembling the plaintiff's, it seems not to be necessary to allege that the defendant appropriated the plaintiff's mark knowingly, and with the intention to have his goods pass for the plaintiff's. *Millington v. Fox*, 3 Mylne & C. 338; *Cartier v. Carlile*, 31 Beav. 292; *Edelsten v. Edelsten*, 1 De Gex, J. & S. 185; *Dale v. Smithson*, 12 Abb. Pr. 237; *Coffeen v. Brunton*, 4

McLean, 516. But see *Perry v. Truefitt*, 6 Beav. 66; *Drewry*, Injunctions, part 2, c. 4, p. 53, *contra*. See also *Dixon v. Fawcus*, 3 El. & E. 537, 546; *Farina v. Silverlock*, 6 De Gex, M. & G. 214, 222. But the court will not decree an account of profits and damages before knowledge of the plaintiff's rights. *Edelsten v. Edelsten*, 1 De Gex, J. & S. 185. See *Millington v. Fox*, *supra*; *Burgess v. Hills*, 26 Beav. 244.

Where the mark employed by the defendant is not the same as that used by the plaintiff, an allegation is necessary to the effect that the defendant's mark bears *so close a resemblance* to the plaintiff's as to be calculated to deceive. *Crawshay v. Thompson*, *supra*; *Gillott v. Esterbrook*, 48 N. Y. 374; *Partridge v. Menck*, 2 Sandf. Ch. 622. This in fact would seem to be the proper allegation in all cases where the defendant has not used the plaintiff's own stamp or device; for except in that case the mark used by the defendant can only resemble that of the plaintiff.

In order to entitle the plaintiff to substantial damages, there must also be proof of actual deception; for without this the plaintiff is not injured. But a general allegation of injury is sufficient to entitle the plaintiff to a recovery. *Rodgers v. Nowill*, *supra*; *Marsh v. Billings*. See *Coats v. Holbrook*, 2 Sandf. Ch. 586, 597, where the court held it no defence that the defendants may have told the jobbers to whom they sold that the goods were imitation; for it was not to be presumed that the jobbers and retailers would be so honest.

Where the defendant obtains and uses the plaintiff's stamp for making the mark, or where he uses the plaintiff's label, without his consent, an action

will lie without proof of damage. *Blofeld v. Payne*, 4 Barn. & Ad. 410.

As to notice, it appeared in *Crawshay v. Thompson* that the plaintiff had complained to the defendants of their use of the stamp in question, designating it as "a palpable fraud." The defendants replied that they had used the mark for many years, and that they had a right to do so. The statement that they had used the mark for many years was not true; but it was shown that the mark had been adopted by them in the execution of orders from foreign countries. The plaintiff now contended that the failure to respect the notice given the defendants concerning the use of the mark adopted by them gave him a right of action. But the court held otherwise, in the absence of proof of an intention to deceive. "It appears to me," said Coltman, J., "that an intention to deceive is a necessary ingredient in this case. The intention is for the jury; and fraud must be made out by proof of an intention existing in the mind of the party, that the iron should pass as the iron of the plaintiff. If there was such a similarity as might impose on ordinary persons, and it was shown that the defendants were aware of the resemblance, and that it was calculated to mislead, the plaintiff would have been entitled to the verdict, for the intention to deceive would have been manifest." Referring directly to the matter of notice, he said that the notice was equivocal. If it meant that the defendants must have known that injury would necessarily result to the plaintiff from the continued use of the mark, it would give some color to the plaintiff's position. But he thought that was not the case, and that it was only a circumstance which with the whole case was properly left to the

jury. By this the learned judge seems to have meant that the notice given, and the reply and action of the defendants, were circumstances bearing on the allegation of intent to injure the plaintiff; and that they were not necessarily proof of such intent. Maule, J., said: "If a party is merely told that by continuing to do a certain thing he may deceive others, and he continues to do the thing without any intention to produce that effect, I do not think that an action will lie against him; at any rate, certainly not in this form of declaration." Creswell, J. "What is the notice here? It is to the effect that the defendants were using a mark similar to that used by the plaintiff. But such a notice is not equivalent to knowledge, as the defendants might dispute the resemblance; or they might admit the resemblance, and yet insist that they had no intention of passing off their goods as the plaintiff's."

It may be remarked upon the doctrine of *Sykes v. Sykes*, first, that a declaration alleging that goods were sold by the defendant for the purpose of being resold as and for the plaintiff's goods (a mark being used, intended and calculated to deceive) would be good. The court in *Sykes v. Sykes* said that *proof* of this kind was no variation from the allegation of the declaration that the defendant had sold the goods as and for the plaintiff's. And it may be added that though the defendant in such case do not himself sell the goods as and for the plaintiff's,

he still closely imitates the plaintiff's trade-mark for the purpose of deceiving the public and obtaining the plaintiff's trade. And these, we have seen, are the elements of this action. If the defendant, to screen himself, procures or aids others to dispose of his goods as the goods of the plaintiff, that will bring him within the rule in *Crawshay v. Thompson*, since it shows an intention to injure the plaintiff.

Secondly, it would seem to follow that it is not necessary to prove that the *defendant* has sold the goods, if he has put them into the hands of others who have sold them. And this is confirmed by cases like *Parley v. Freeman*. It is not necessary in those cases, as we have seen, that the defendant should have obtained an advantage in order to make him liable for a false representation.

It should be remarked that the act of Congress concerning trade-marks, whatever protection it gives which was not afforded before, takes away no rights of parties at the common law. See *Brown, Trade-marks*, pp. 232, 233.

It is proper to add, before concluding the subject of deceit, that cases of slander of title and fraudulent trade-marks are only *examples* of actions where the representation was made to third persons. There are doubtless many other cases of the kind where an action of deceit can be brought by the party of whom the false statement was made. See, for example, *Benton v. Pratt*, 2 Wend. 385.

SLANDER AND LIBEL. •

PEAKE v. OLDHAM, leading case.
 BROOKER v. COFFIN, leading case.
 WARD v. CLARK, leading case.
 CARSLAKE v. MAPLEDORAM, leading case.
 LUMBY v. ALLDAY, leading case.
 THORLEY v. KERRY, leading case.

Note on Actionable Words.

Historical aspects of the subject.
 Doctrine of *mitiori sensu*.
 Imputation of indictable offence.
 Imputation of contagious or infectious disorder.
 Imputation affecting plaintiff in his office or avocation.
 Imputations tending to the disherison of the plaintiff.
 Libel.
 Truth of charge.
 Non-actionable words.

CHALMERS v. PAYNE, leading case.

Note on Malice in Law.

HASTINGS v. LUSK, leading case.
 BROMAGE v. PROSSER, leading case.
 TOOGOOD v. SPYRING, leading case.
 DE CRESPIGNY v. WELLESLEY, leading case.

Note on Malice in Fact. Privileged Communications.

Absolute privilege.
 Proceedings before church organizations.
 Reports of judicial trials and other public proceedings.
 Master giving character to servant.
 Communications made to public authorities.
 Communications between persons holding confidential relations.
 Publications in vindication of character.
 The principle of the cases stated.
 Northampton's Case.

PEAKE v. OLDHAM, in Error.

(1 Cowp. 275. King's Bench, England, Easter Term, 1775.)

Interpretation of Words. "I am thoroughly convinced that you are guilty (innuendo of the death of D. D.); and, rather than you should go without a hangman, I will hang you;" *held*, actionable.

"You are guilty" (innuendo of the murder of D. D.); *held*, after verdict, a sufficient charge of murder, though the *colloquium* were only of the death.

ERROR from the Common Pleas in an action of slander, in which the plaintiff, now the defendant in error, declared that upon a *colloquium* of and concerning the death of one Daniel Dolly, the said Thomas Peake said to the said James Oldham: 1. "You are a bad man, and I am thoroughly convinced that you are guilty (meaning guilty of the murder of the said Dolly); and, rather than you should want a hangman, I would be your executioner." And being apprized that the said words were actionable, and being interrogated how he would prove what he said, answered that "he would prove it by Mrs. Harvey." 2. "You are a bad man, and I am thoroughly convinced that you are guilty (innuendo *ut antea*); and, rather than you should want a hangman, I would be your executioner." Being interrogated how he could prove the said James Oldham guilty of the murder of the said Daniel Dolly, he replied, "I can prove it by Mrs. Harvey." 3. "You are guilty (innuendo *ut antea*), and I will prove it." 4. "I am thoroughly convinced that you are guilty (meaning guilty of the death of Daniel Dolly); and, rather than you should go without a hangman, I will hang you." 5. "You are guilty" (innuendo guilty of the murder of the said Dolly). By reason whereof, and to clear his character, the said James Oldham was obliged to procure, and did procure, an inquest in due form of law to be taken on the body of the said Daniel Dolly.

Upon not guilty pleaded, the jury found a general verdict upon all the counts, with 500*l.* damages.

The defendant first moved for a new trial in C. B., which was refused; and afterwards in arrest of judgment, which rule was likewise discharged by Gould and Blackstone, JJ. (*absentib.* De Grey, C. J., and Nares, J.).

Mr. Davenport, for the plaintiff in error.

Mr. Buller, for the defendant, was stopped by Lord Mansfield, as being unnecessary to give himself any trouble.

LORD MANSFIELD. It is much to be lamented that in any sort of action the mere inattention or slip of counsel, who are not always sufficiently attentive upon what count the verdict is taken, should be fatal to the party; contrary to the truth and justice of the case, the opinion of the judge upon the merits who tried the cause, and the meaning of the jury who pronounced the verdict. However, in civil cases the rule most certainly is settled, that where a verdict is taken generally, and any one

count is bad, it vitiates the whole. It has always struck me that the rule would have been much more proper to have said, that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. In criminal cases the rule is so; and one cannot, therefore, but lament that the reverse is adopted in civil cases; because it is as it were catching justice in a net of form. However, this consideration will make the court lean against setting aside a verdict upon such an objection without very good reason, that is, without some apparent manifest defect; more especially in a case like the present, where the words have appeared to the jury to be so scandalous as to induce them to give a verdict with 500*l.* damages, and where that verdict has received the sanction of the court in which the action was brought, by their refusing to grant a new trial upon an application to them for that purpose.

Let us consider, then, the grounds upon which the declaration in the present case is attempted to be impeached. Two of the counts are objected to, viz., the fourth and last. In the fourth it is said thus: "I am thoroughly convinced that you are guilty (innuendo that you are guilty of the death of the said Daniel Dolly); and, rather than you should go without a hangman, I will hang you." Upon this count it is argued that there are many innocent ways by which one man may occasion the death of another; therefore the words, "guilty of the death," do not in themselves necessarily import a charge of murder; and consequently, as no particular act is charged which in itself amounts to an imputation of a crime, the words are defectively laid. What! when the defendant tells the plaintiff "he is guilty of the death of a person," is not that a charge and imputation of a very foul and heinous kind? Saying that such a one is the *cause* of another's death, as in the case in 2 Bulstr. 10, 11, is very different; because a physician may be the cause of a man's death, and very innocently so; but the word "guilty" implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But the defendant does not rest here; on the contrary, in order to explain his meaning, he goes on and says, "and, rather than you should be without a hangman, I will hang you." These words plainly show what species of death the defendant meant, and therefore in themselves manifestly import a charge of murder.

The innuendo to the words of the next count is, that they mean "guilty of the murder of Daniel Dolly;" and the jury by their verdict have found the fact, namely, that such was the meaning of the defendant. But that is not all; for the jury find a special damage sustained by the plaintiff in being obliged, in consequence of the charge so made by the defendant, to have an inquest taken on the body of the deceased.

What! after a verdict, shall the court be guessing and inventing a mode, in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are defectively laid, a verdict will not cure them. But where, from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptance and meaning of them.

I am furnished with a case founded in strong sense and reason in support of this opinion; the name of it is *Ward v. Reynolds*, Pas. 12, Ann. B. R., and it is as follows: The defendant said to the plaintiff, "I know you very well; how did your husband die?" The plaintiff answered, "As you may, if it please God." The defendant replied, "No; he died of a wound you gave him." On not guilty, there was a verdict for the plaintiff; and on a motion in arrest of judgment the court held the words actionable; because, from the whole frame of them, they were spoken by way of imputation. And Lord Chief Justice Parker said: "It is very odd that after a verdict a court of justice should be trying whether there may not be a possible case in which words spoken, by way of scandal, might not be innocently said. Whereas, if that were in truth the case, the defendant might have justified, or the verdict would have been otherwise." So here, if shown to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid, and upon the last count have found that the defendant meant a charge of murder. Therefore I am of opinion that the judgment of C. B. must be affirmed.

ASTON, WILLES, and ASHHURST, JJ., of the same opinion.

Judgment affirmed.

BROOKER v. COFFIN.

(5 Johns. 188. Supreme Court, New York, November, 1809.)

Lewdness. Crime. Criterion of Action. To say of a person "she is a common prostitute, and I will prove it;" or, that "she was hired to swear a child on me; she had a child before this when she went to Canada; she would come damned nigh going to the State prison," — is not actionable, without alleging special damage. The rule seems to be, that where the charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment, then the words are in themselves actionable.

THIS was an action for slander. The declaration contained two counts. The first charged that on the 1st of February, 1808, at Schaghticoke, in the county of Rensselaer, &c., for that whereas the plaintiff being a person of good name, &c., the defendant falsely and maliciously did speak and utter of and concerning the plaintiff the following false, scandalous, and defamatory words: "She (meaning the plaintiff) is a common prostitute, and I can prove it." The second count charged that the defendant afterwards, to wit, on the day and year aforesaid, at the place aforesaid, in a certain other discourse, &c., did falsely and maliciously speak and utter the following false, scandalous, and defamatory words, to wit, "She (meaning the plaintiff) was hired to swear the child on me (meaning the plaintiff was hired falsely and maliciously to swear a certain child on the defendant). She (meaning the plaintiff) has had a child before this (meaning before this child, or the child which the said defendant had before said the said Nancy had been hired to swear on him), when she went to Canada (meaning a certain time when the plaintiff had been at Canada). She (meaning the plaintiff) would come damned nigh going to the State prison" (meaning that the said plaintiff was guilty of such enormous and wicked crimes as would, if punished according to the laws and statutes in such cases made and provided, condemn her to infamous punishment in the State prison). Whereas, in truth, &c.

There was a general demurrer to the first count, and a special demurrer to the second count and joinder.

Wendell, in support of the demurrer. In England there are

various statutes for the punishment of disorderly persons. 4 Com. Just. B. 76, 83. But the decisions in support of the action have been where the party shows a special damage, as for calling a woman a whore, whereby she lost her marriage. Com. Dig. 262, Action for Defamation, D. 30. Notwithstanding the statutes against disorderly persons, it has never been held that those words were actionable, without alleging a special damage. It is true that, by the act for apprehending and punishing disorderly persons, a common prostitute is declared to be a disorderly person, and therefore liable to punishment; but, by the same act, vagrants, beggars, jugglers, pretenders to physiognomy, palmistry, or such crafty sciences, fortune-tellers, discoverers of lost goods, persons running away from their wives and children, vagabonds and wanderers, and all idle persons not having visible means of livelihood, are also declared to be disorderly persons, and are equally liable to be apprehended and punished under the act. If, then, to call a woman a common prostitute is actionable, without alleging special damage, on the ground of a liability to punishment under this act, then to call a person a juggler, fortune-teller, or physiognomist, would also be actionable, which will hardly be pretended.

The words, "that the plaintiff was hired to swear a child," are not actionable (1 Com. 270, F. 12, D. 6), and they are not helped out by the innuendo. The words are ambiguous, and it is not said whose child was referred to, so that the defendant could not come prepared to prove the truth of the words. The words, that "she would come damned nigh going to the State prison," are too vague and general to be the ground of an action. 2 Johns. 12.

Again, in the second count the plaintiff does not aver that she was of good fame, &c., and free from the crime charged against her. 1 Com. Dig. 276, G. I.

Sedgwick, contra. 1. The numerous cases to be found in the books relative to the action of slander, and as to what words are actionable and what are not, are so contradictory and absurd as to afford no satisfactory rule on the subject. 1 Com. Dig. Action on the Case for Defamation, D. 3, D. 9, F. 20; 3 Black. Com. 124; 4 Bac. Abr. 487. Resort must, therefore, be had to the principle on which the action of slander is founded. Where the words spoken impute to a person an act of moral

turpitude or crime which may subject him to punishment, they are actionable. Here the words, besides imputing great moral turpitude, and tending to render the person odious in the opinion of mankind, may, if true, also subject the party to an infamous and disgraceful punishment. Common prostitutes, by the act which has been cited, are declared disorderly persons, and may be sent to bridewell or the house of correction, and be kept to hard labor for sixty days, or even for six months; and, moreover, may be whipped at the discretion of the general sessions of the peace. The first set of words charged in the declaration is, according to the general principle I have stated on this subject, actionable.

2. As to the second set of words, I admit that the sense of them cannot be enlarged by innuendo. The true rule is, that the words are to be taken in the sense in which they are understood by the generality of mankind. This rule is well laid down and illustrated by Lord Ellenborough, in the case of *Woolnoth v. Meadows*, 5 East, 468; Cowp. 275, 278; 2 Ld. Raym. 959; 1 Vent. 117. If the words, then, fairly import the charge of a crime, and would be so understood by mankind, the injury is inflicted on the character of the plaintiff, as completely and deeply as if the crime had been imputed in the most direct and positive terms; and the plaintiff is entitled to a remedy. Can there be any doubt in the mind of any man that the defendant meant to say that the plaintiff had been guilty of perjury?

Wendell, in reply, observed that if to say of a person what, if true, might subject him to an indictment, would render the words actionable, without alleging special damages, then to say of a person that he had committed an assault and battery on another, would be actionable.

SPENCER, J., delivered the opinion of the court. The first count is for these words, "she is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action without alleging special damages. By the statute (1 R. L. 124), common prostitutes are adjudged disorderly persons, and are liable to commitment by any justice of the peace, upon conviction, to the bridewell or house of correction, to be kept at hard labor for a period not exceeding sixty days, or until the next general sessions of the peace. It has been supposed that, therefore, to charge a woman with being a common

prostitute, was charging her with such an offence as would give an action for the slander. The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F. 20. There is not, perhaps, so much uncertainty in the law upon any subject, as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they therefore adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective.

The second count is for saying of the plaintiff, "she was hired to swear the child on me; she has had a child before this when she went to Canada; she would come damned near going to the State prison." These words are laid as spoken at one time; if, then, any of them are actionable, it is sufficient. The innuendoes enlarge their meaning, and are not justified. One of them avers that the defendant meant that the plaintiff was hired, falsely and maliciously, to swear the child on the defendant; and another innuendo, in explaining the words, "she would come damned near going to State prison," alleges that the defendant meant that the plaintiff was guilty of such enormous crimes as would, if punished according to the laws, &c., condemn her to infamous punishment in the State prison. Now I do not perceive that the charge at all warrants the inference that the plaintiff

had been guilty of perjury ; and the cases of *Hopkins v. Beedle*, 1 Caines, 347 ; *Stafford v. Green*, 1 Johns. Rep. 505 ; and *Ward v. Clark*, 2 Johns. Rep. 11, *infra*, are authorities against sustaining this case.

The defendant must, therefore, have judgment.

WARD v. CLARK.

(2 Johns. 10. Supreme Court, New York, November, 1806.)

Imputation of Crime. To say of a person, "he has sworn falsely," or "he has taken a false oath against me in Squire Jamison's court," or "he has falsely and maliciously charged and imposed on me the crime of perjury," is not actionable.

THIS cause came before the court on a return to a writ of error, directed to the Court of Common Pleas of the county of Ontario. The defendant in error brought his action of slander, against the plaintiff in error, in the court below. The declaration contained two counts. In the first, the words charged to have been spoken are, "he has sworn falsely ; he has taken a false oath against me in Squire Jamison's court." The second count was for "falsely and maliciously charging and imposing, on the plaintiff below, the crime of perjury." There was a plea of not guilty ; and a general verdict for ten dollars damages.

Mumford, for the plaintiff in error. The words laid in the first count are merely that the plaintiff swore falsely, and do not amount to the crime of perjury. There is no averment that Squire Jamison was a justice of the peace, or that he was competent to administer an oath. These words, therefore, are not actionable. 1 Caines, 347, *Hopkins v. Beedle* ; 3 Levinz, 166, *Gurneth v. Derry* ; 6 Term, 691, *Holt v. Scholefield* ; 3 Wilson, 186, *Onslow v. Horne* ; Bac. Abr. tit. Slander, B. 3. 2. The second count states the charge of perjury generally. It ought to have specified the words spoken, for it is impossible that the defendant can come prepared to defend so general and uncertain a charge. Still, if this count be good, and the first bad, there being a general verdict, the judgment must be reversed. 1 Caines, 347 ; Douglas, 730 ; 1 Term, 153 ; 2 Term, 125.

Sedgwick, contra. No doubt, if none of the words contained in the first count be actionable, the judgment must be reversed; but if any set of them are actionable, it is sufficient to support the verdict. Where some of the words are actionable, and others not so, the court will not arrest the judgment. *Willes*, 443, *Lloyd v. Morris*. To say of a person, he is forsworn on record, or he is forsworn before a justice of the peace, is actionable. 1 Comyns's Digest, Action for Defamation, D. 5, 6, 7; 6 Bac. Abr. 207, Slander, B. 3. Now the words in the first count appear equally definite, and import the crime of perjury.

The second count states a general charge of perjury. This is sufficiently precise for the purpose of pleading. Where the words were *quia crimen felonix imposuit*, they were held sufficient to support an action. 1 Ventris, 264.

TOMPKINS, J., delivered the opinion of the court.

The plaintiff in error relies on the insufficiency of the declaration in the court below, for the reversal of the judgment rendered there.

No *colloquium*, or averment of special damages, is contained in the declaration. The words in the first count, then, are not actionable, unless they must necessarily be understood as conveying a charge of perjury. This is not to be collected from them, because it does not appear that Jamison had any authority to hold a court known in law, or to act judicially, or to administer an oath; and, therefore, a charge of having taken a false oath before him does not necessarily impute any crime for which a person may be indicted and punished. Even if the court referred to by the words were known and recognized by this court, there is no *colloquium* of any cause there depending, without which the declaration is insufficient; for the words may have been spoken in common discourse. *Hartwel v. Cole*, Freem. 55; *Yelverton*, 27, *Core v. Morton*.

These words, "thou art forsworn in Collet Court," without showing any action pending there, and without further description of the court, were held not to be actionable. *Skinner v. Trobe*, Cro. Ja. 190. In *Page v. Keble*, Cro. Ja. 486, a similar judgment was given, upon a declaration upon these words, "thou art perjured, for thou art forsworn in the Bishop of Gloucester's court." The doctrine recognized in this court, in the cause of *Hopkins v. Beedle*, 1 Caines, 347, goes the length of determining the ques-

tion upon the count now under consideration. It was there adjudged that, to convey the charge of perjury, the words must be certain and unequivocal, and state the court, or a competent officer, who administered the oath; and in a more recent case, *Green v. Stafford*, a count for words similar to those in the first count in this declaration was held to be defective. The rule in relation to these and similar words is, that where one person calls another a perjured man, it shall be intended that the same was in a court of justice, and to have a necessary reference to it; but for a charge of false swearing no action lies, unless the declaration shows that the speaking of the words had a reference to a judicial court or proceeding. 2 Bulstr. 150, *Croford v. Blisse*; *Yelverton*, 27, *Core v. Morton*.

The second count appears to me to be equally defective. It is not alleged what particular words were spoken; nor does the plaintiff pretend to set forth the substance of the expressions of which he complains. No precedent, ancient or modern, warrants this form of pleading. The plaintiff contents himself with drawing his own inference from the declaration made, and alleged such inference, without apprising the defendant of the words, or substance of the words, spoken. The rule of evidence in actions of slander formerly was, that the plaintiff must prove the precise words; and that rule has been no further relaxed than to admit proof of the substance of the words laid. With respect to declaring, it has been repeatedly resolved that it is not sufficient to set forth the tenor, effect, or import of the words used. *Newton v. Stubbs*, 3 Mod. 72, and 2 Show. 436; *Hale v. Cranfield*, Cro. Eliz. 645; *ib.* 857. No precedent for this count was cited upon the argument, and my researches have furnished me with none. In *Morgan's Precedents*, 268, is to be found the only form which bears a resemblance to this count. It was for charging and imposing upon the plaintiff the crime of arson, before a magistrate, to wit, of maliciously and feloniously setting fire to a certain house, particularly described therein. In 2 *Richardson's Practice*, K. B. 108, is the form of a declaration, charging the substance and import of the particular words used. Without questioning the correctness of these precedents, it is evident that the same objections do not lie to them as are presented by this count. The generality and uncertainty of the charge is a decisive objection to it. By this mode of declaring, the defendant

is deprived of an opportunity of pleading matter which he might properly set up (if he was apprised, by the declaration, of the specific words), as that they were spoken with reference to a different subject, or in a different sense, than that in which the plaintiff thinks proper to apply them. *Cromwell's Case*, 4 Rep. 13. This he cannot do if the mode of declaring adopted by the plaintiff, in the second count, is allowed. Besides, the defendant may thereby be deprived of the advantages which might result to him from a motion in arrest of judgment, or upon a writ of error. Upon the whole, we are of opinion that the second count violates the rule of correct pleading, and leads to unnecessary surprise and vexation. The judgment below, must, therefore, be reversed for the insufficiency of both counts in the declaration.

Judgment reversed.

CARSLAKE *v.* MAPLEDORAM.

(2 T. R. 473. King's Bench, England, Easter Term, 1788.)

Contagious Disease. These words spoken of a woman, "I have kept her common these seven years; she hath given me the bad disorder, and three or four other gentlemen," are not actionable, because they may refer to a time past. And no prohibition will be granted to a spiritual court in which a sentence has been pronounced on a libel for this charge. Charging a person with *having had* a contagious disorder is not actionable, because it is no reason why the company of a person so charged should be avoided.

THE defendant libelled the plaintiff in the archdeacon's court of Exeter, for speaking the following words of her: "I have kept her common these seven years; she hath given me the bad disorder, and three or four other gentlemen besides;" thereby meaning that the said Mapledoram was a whore. A prohibition was moved for in the last term after sentence, on the ground that the words spoken were actionable.

Gibbs now showed cause against the prohibition. This application is made after sentence; and, therefore, unless it appear on the face of the proceedings that the court below had no jurisdiction over the subject-matter, a prohibition ought not to be granted. Now, these words are not actionable in themselves, even if the charge related to the present time; and a declaration, without

innuendoes to explain the meaning of them, would be bad. For there are many disorders which may be termed bad disorders, but the having of which would not render the person an unfit member of society, or be any imputation on him; a bad disorder does not necessarily mean a contagious one. But even supposing that it did, still these words only refer to a time past, and therefore are not actionable. There are two grounds on which words are actionable, as producing a temporal damage: first, charging a person with having committed a crime, for which he may be afterwards punished; and, secondly, charging a person with having at the time contagious disorder. Charging a man with the first of these at a time past is actionable, because he is liable to punishment at any distance of time; but the latter charge does not subject the person making it to an action, unless it be confined to the present time; since the having had a contagious disorder is no reason why his society should be avoided in future.

Franklin, in support of the rule. The words are actionable without any innuendo; they sufficiently import a contagious disorder, since the plaintiff below is charged with having communicated it to the defendant himself, and to three or four other persons. In answer to the second ground of objection, it cannot be collected that this charge relates to a time past: it is not that the plaintiff below had had this disorder, but the words charged her with having it at the time. But even if the charge did relate to a time past, still these words are actionable. In *Austin v. White*, Cro. Eliz. 214, these words, "thou wert laid of the French 'pox,'" were adjudged actionable. In *Miller's Case*, Cro. Jac. 430, *Backster's Case* is mentioned, where the words, "thou wast laid of the 'pox,'" were held actionable. So in *Hob. 219*, "that he had caught it, and had carried it home to his wife." In these cases the words clearly refer to a time past. So that it appears upon the libel itself that the court below had no jurisdiction.

ASHHURST, J. No sufficient ground has been laid before the court to induce us to interpose in this case, and grant a prohibition. This is an application after sentence has been pronounced in the court below. And it seems, on the whole, that the court below had a jurisdiction over the subject-matter. If the plaintiff had called the defendant a whore, such a charge would have given the court below a jurisdiction; and these words, "he hath

kept her common these seven years," are tantamount to it. Then, notwithstanding the latter words, if the archdeacon's court had a jurisdiction as to part of the charge, these latter words would not make any difference. As to those, the distinction has been properly taken. Charging a person with having committed a crime is actionable, because the person charged may still be punished: it affects him in his liberty. But charging another with having had a contagious disorder is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society. Therefore, unless some special damage be alleged in consequence of that kind of charge, the words are not actionable. That seems to be the case in all the instances (*vide* also *Taylor v. Hall*, 2 Str. 1189) mentioned except one, where the words were, "thou wert laid of the 'pox';" but that seems unintelligible from the report of the case, which is very loosely reported, and, therefore, it is not much to be relied on. But, on principle, these words are clearly not actionable, if spoken with a reference to time past. And in this case I think they do relate to past time.

BULLER, J. After sentence, it is incumbent on the party making this application to show clearly that the spiritual court had no jurisdiction. If, therefore, it be doubtful, it is an answer to the application. Now in this case it is taking the words against their natural import to suppose that they were spoken of the present time. If they relate to time past, I do not think they are actionable. There is no distinction between a charge of this sort and a charge of the leprosy, which is to be found in the old books. In those cases it is said that a charge of having had such a disorder is no imputation on another, since it does not subject him to any of the inconveniences attending the having such a disease; so of all other diseases which are contagious. The reason why the making of such a charge is actionable is because the having a contagious disorder renders the person an improper member of society; but there is no reason why the company of a person who has had a contagious disorder should be avoided, and, therefore, such a charge is not actionable. The case in *Cro. Eliz.* which has been cited is too loosely reported to be relied on.

GROSE, J., of the same opinion.

Rule discharged.

LUMBY v. ALLDAY.

(1 Tyrw. 217; s. c. 1 Crompt. & J. 301. Exchequer, England, Hilary Term, 1831.)

Disqualification for Office. Where words are spoken of a person in an office of profit which have a natural tendency to occasion the loss of such office, or which impute the want of some necessary qualification for or some misconduct in it, they are actionable. *Secus*, if a clerk to a gas-light company is charged with immoral conduct with women, that imputation having no reference to his office, the words not being laid to have been spoken of him in his office as clerk, nor proved to have occasioned him any special damage.

CASE for words. The first count of the declaration stated that, before the speaking of the words, the plaintiff was, and hitherto has been, and still is, clerk to a certain incorporated company, to wit, the Birmingham and Staffordshire Gas-Light Company, and, as such clerk, had always behaved himself with great diligence, industry, and propriety, and thereby had acquired, and was acquiring, great gains and profits in his said situation as clerk to the said company; nevertheless, the defendant, well knowing the premises, but intending to bring the plaintiff into public infamy and disgrace with and among all his neighbors, and the said persons composing the said company, and to cause it to be suspected and believed by his neighbors and subjects, and the persons composing the said company, that the said plaintiff was of a bad character and unfit to hold his situation of clerk to the said company, and an improper person to be employed by the said company, and to cause him to be deprived of and lose his situation, and to vex, &c., him, the said plaintiff, on, &c., at, &c., in a certain discourse which the said defendant then and there had with the said plaintiff of and concerning the said plaintiff, and of and concerning the premises, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the premises, these false, scandalous, malicious, and defamatory words following; that is to say, "You (meaning the said plaintiff) are a fellow, a disgrace to the town, unfit to hold your (then and there meaning the said plaintiff's) situation (then and there meaning the said situation of clerk to

the Birmingham and Staffordshire Gas-Light Company) for your conduct with whores; I will have you in the "Argus;" you (then and there meaning the said plaintiff) have bought up all the copies of the "Argus," knowing you (then and there meaning the said plaintiff) were exposed; you may drown yourself, for you (then and there meaning the said plaintiff) are not fit to live, and a disgrace to the situation you (then and there meaning the said plaintiff) hold" (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas-Light Company).

The above words were stated with some variations in several other counts. Plea, general issue. At the trial before Alexander, C. B., at the Warwick Summer Assizes, in 1830, it appeared that the plaintiff had for three years acted as clerk to the Birmingham and Staffordshire Gas-Light Company, at a salary of 250*l.* per annum. The most defamatory of the words laid in the first count were proved. The "Argus" was proved to be a publication appearing at Birmingham monthly. No proof was given of any written appointment of the plaintiff as clerk. The Chief Baron directed the jury that if in their opinion the words used would probably tend to injure the plaintiff in his office of clerk, he was entitled to a verdict. The jury found a general verdict for plaintiff. Damages, 40*s.*

BAYLEY, B., now delivered the judgment of the court. This case came before the court on a rule *nisi* to enter a nonsuit, the ground of which was, that the words proved on the trial were not actionable.

Two points were discussed upon this rule: one, whether the words were actionable or not; and the other, whether this was properly a ground of nonsuit.

The declaration stated that the plaintiff was clerk to an incorporated company, called the Birmingham and Staffordshire Gas-Light Company, and had behaved himself as such clerk with great propriety, and thereby acquired, and was daily acquiring, great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words in the first count (which the learned judge here read).

The objection to maintaining an action on these words is, that

it is only on the ground of the plaintiff's being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not from their tenor import that they were spoken with any such reference; and that they do not impute to him the want of any qualification which a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by De Grey, C. J., in *Onslow v. Horne*, 3 Wils. 186, that words are actionable when spoken of one in an office of profit which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and businesses, and do or may probably tend to their damage. The same case occurs in Sir William Blackstone's Reports, 753, where the rule is expressed to be, "if words may be of probable ill consequence to a person in a trade, or profession, or office."

The objection to the rule as expressed in both reports appears to me to be, that the word "probably" or "probable" is too indefinite and loose, and that unless it is considered as equivalent with "having a natural tendency to," and is confined within the limits I have expressed in stating the defendant's objection, viz., that of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant. Every authority I have been able to meet with either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. Immorality only, however gross, is all which is imputed, as here charged. As at present advised, therefore, we are of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply a want of any of those qualifications which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk.¹

¹ As to the other point in the case, it was held that, as the speaking of the words alleged was proved, there was no ground for a nonsuit; but liberty was given to move in arrest of judgment.

THORLEY v. LORD KERRY.

(4 Taunt. 856. Exchequer Chamber, England, Easter Term, 1812.)

Libel. An action may be maintained for words written, for which an action could not be maintained if they were merely spoken.

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench. The plaintiff below declared that he was a good, true, honest, just, and faithful subject of the realm, and, as such, had always behaved, and considered himself, and, until the committing of the several grievances by the defendant thereafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit, to wit, in the parish of Petersham, in the county of Surrey, and also that he had not ever been guilty, or, until the time, &c., been suspected, of the offences and misconduct thereafter mentioned to have been charged upon and imputed to him; or of any such offences or misconduct, by means of which premises he had before the committing of the several grievances deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was known, to wit, at Petersham; and also that, before and at the time of the committing of the grievances by the defendant below, as hereinafter mentioned, the plaintiff below was tenant to the Right Hon. Archibald Lord Douglas, of a messuage and premises, with the appurtenances, situate in the parish of Petersham, and he being desirous and intending to become a parishioner of the same parish, and to qualify himself to attend the vestry of and for such parish, as such parishioner, agreed with Lord Douglas to pay the taxes of and for the said house, which he so inhabited as tenant to Lord Douglas; and also that, before and at the time of the committing of the grievances by the defendant below in the first count mentioned, the defendant below was the church-warden of and for the parish of Petersham, and the plaintiff below, so being desirous and intending to attend such vestry of such parish as such parishioner, had thereupon, by his certain note in writing, given

notice to the defendant below of his agreement with Lord Douglas; yet the defendant below, well knowing the premises, and greatly envying the happy state and condition of the plaintiff below, and contriving, and wickedly and maliciously intending, to injure him in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that he has been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him, and to vex, harass, and oppress him, at Petersham aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning him, and concerning such agreement with Lord Douglas, and concerning the said note in writing, a certain false, scandalous, malicious, and defamatory libel in the form of a letter to the plaintiff below, containing, amongst other things, the false, scandalous, malicious, and defamatory and libellous matter following (accompanied with the following amongst other innuendoes), that is to say, " My lord, I conceive, as churchwarden (meaning as churchwarden of the parish of Petersham), I have nothing to say to any private agreement with Lord Douglas and yourself; your note (meaning the note sent to the defendant below by the plaintiff below), and the manner it was conveyed to me, shows your lordship still possesses that perturbed spirit which I had hoped, for your own sake, after the composition and publishing of the scurrilous address of the 26th August, would have been at rest. I had before read the virulent, disrespectful, and ungentlemanlike letters to the Rev. Mr. Marsham; I sincerely pity the man (meaning the plaintiff below) that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods. N. B. It was my intention never to have held or had communication with a writer of anonymous letters (meaning that the plaintiff below was a writer of anonymous letters), but it appears I cannot now avoid it" (thereby meaning that the plaintiff below had been and was guilty of hypocrisy and dishonorable conduct). There were other counts setting out parts only of the same letter; and the plaintiff below concluded by

averring that by means of the committing of the grievances by the defendant below, the plaintiff below had been and was greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, inso-much that divers of those neighbors and subjects to whom the innocence, candor, truth, integrity, reverence, and respect of the religion of the plaintiff below was unknown, had, on occasion of the committing of the said several grievances by the defendant below, from thence hitherto suspected and believed, and still did suspect and believe, the plaintiff below to have been guilty of the offences and improper conduct imputed to him as aforesaid, and to have been and still to be guilty of hypocrisy, malice, uncharitableness, and falsehood; and had, by reason of the committing of the several grievances by the defendant below, from thence hitherto, and still did refuse to have any acquaintance, intercourse, or discourse with the plaintiff below, as they were before used and accustomed to have, and otherwise would have had. And the plaintiff below had been and was by means of the premises otherwise greatly injured, to wit, in the parish of Petersham, to his damage of 2,000*l*. Upon not guilty pleaded, the cause was tried at the Surrey Spring Assizes, 1809, when the writing of the letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it. A verdict was found for the plaintiff with 20*l*. damages, and judgment passed for the plaintiff without argument in the court below. The plaintiff in error assigned the general errors.

Barnewall, for the plaintiff in error, in Trinity Term, 1811, argued that there were no words in this case, for which, if spoken, the action would be maintainable, and he denied that there was any solid ground, either in authority or principle, for the distinction supposed to have prevailed in some cases, that certain words are actionable when written which are not actionable when spoken. He contended that all actionable words were reducible to three classes: 1, Where they impute a punishable crime; 2, Where they impute an infectious disorder; 3, Where they tend to injure a person in his office, trade, or profession, or tend to disherison, or produce special pecuniary damages. 1 Roll. Abr. Action sur Cas pur Parols, *passim*; Com. Dig. Action upon the Case for Defamation, *passim*. And these words do not come within either

of those classes. Neither of those books recognize the distinction between written and unwritten slander. All the older cases treat them on the same footing. *Brook v. Watson*, Cro. Eliz. 403. "He is a false knave and keepeth a false debt book, for he chargeth me with the receipt of a piece of velvet, which is false." The words were held not to be actionable, and no such distinction was there taken. So *Boughton v. Bishop of Coventry and Lichfield*, Anderson, 119. The words, "he is a vermin in the commonwealth, a false and corrupt man, an hypocrite in the church of God, a false brother amongst us," were held not actionable. There is also a material distinction, which has been overlooked in all the cases, between those words which, tending to irritate and vilify, are indictable, because they conduce to a breach of the peace, and those which are of themselves actionable, the latter class being by no means so extensive as the former. Comyns, in his Dig. Libel, A. 3, when he cites Fitzgibb. 121, 258, that it is a libel if he publishes in writing, though in words not actionable, is considering this matter wholly in a criminal point of view. The last-mentioned distinction must necessarily exist, because the ground of action is the amount of the civil injury sustained by the plaintiff, not the immorality of the defendant. In the case of *King v. Lake*, indeed, Hardr. 470, which was an action for words in an answer to a petition preferred by the plaintiff to the House of Commons against the defendant, Hale, C. B., held, that although general words spoken once, without writing or publishing them, would not be actionable, yet there, they being writ and published, which contains more malice than if they had been once spoken, they were actionable. And the court being all of that opinion, judgment was given *pro querente nisi causa*, &c. But, in that case, this ground was unnecessary to support the decision, for the words imputed violence, seditious language, illegal assertions, ineptitudes, imperfections, gross ignorances, absurdities, and solecisms, and were laid to be spoken to the plaintiff's damage in his good name and credit and profession as a barrister-at-law. And, in 2 Vent. 28, another action was brought, within five years after, between the same parties, for a letter written by the same defendant to the Countess of Lincoln, damnifying the plaintiff in his profession of a barrister; but, although Vaughan, C. J., contrary to Wyld, Tyrrel, and Archer, JJ., held that the action lay not, the court did not at all advert to the distinction between written

and unwritten slander in support of their judgment. The distinction was indeed noticed in *Harman v. Delany*, Fitzg. 254; but the same case is reported by Strange, vol. ii. 898, who was of counsel in the cause, and who puts it merely on the ground of its being spoken of the plaintiff in his profession. In *Onslow v. Horne*, 3 Wils. 186, it is held that even words imputing a crime are not actionable unless the punishment be infamous. 2 H. Bl. 531, *Savile v. Jardine*, it was held that the word "swindler," when spoken, was not actionable, and the distinction was there, indeed, assumed, and the case is thereupon argued to be reconcilable with *J'Anson v. Stuart*, 1 T. R. 748, where the same word written was held actionable; but in the latter case is an innuendo, that the defendant intended on obtaining money under false pretences, which incurs an infamous punishment, and is therefore clearly actionable, without recurring to the support of this disputed distinction. In the precedents in *Rast.* 12, 13, *Robins. Ent.* 72, the words are not stated as a libel; it seems the distinction was unknown. In *Cropp v. Tilney*, 3 Salk. 226, the words were certainly seditious, if not treasonable. The reason assigned, that the printing or writing indicates a greater degree of malice than mere speaking, is a bad one; for it is not the object of an action at law to punish moral turpitude, but to compensate a civil injury: the compensation must be proportionate to the measure of the damage sustained; but it cannot be said that publication of written slander is in all cases attended with a greater damage than spoken slander; for if a defendant speaks words to a hundred persons assembled, he disseminates the slander and increases the damage a hundred-fold as much as if he only wrote it in a letter to one.

Dampier, in affirmance of the judgment. This action is maintainable, first, because the plaintiff is a peer of the realm; and many things are actionable when spoken of a peer which are not actionable if spoken of a private person; as in the *Marquis of Dorchester's Case*, Mich. 24, Car. 2, B. R. Bull. N. P. 4, "He is no more to be valued than the dog that lies there." So in the case of the *Earl of Peterborough v. Stanton*, ib., "The Earl of Peterborough is of no esteem in this country; no man of reputation has any esteem for him; no man will trust him for twopence; no man values him in the country; I value him no more than the dirt under my feet." It does not appear that either of these was an action of *scandalum magnatum*. The case of the Earl of

Peterborough v. Williams, Comb. 43, 2 Sho. 505, is, indeed, there said to be *scandalum magnatum*. The principle on which actions may be sustained for words is rather narrowly laid down in the argument for the plaintiff in error, when the causes of action are said to be only crime, pecuniary damage, and infectious disease. The gist of the last is, that the imputation deprives the plaintiff of society. But what can more deprive a man of society than this imputation of being one "who, under the cloak of religion and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods"? If this is not a leprosy of the mind as much to be shunned as that of the body, the loss of society is not to be much regretted. If Lake's Case has gone upon his loss as a barrister, there would have been no room for all the discussion that took place; and especially Hale's judgment, taking the distinction between speaking and writing. [HEATH, J. It appears by Skin. 124, that the judgment in the case of King v. Lake was affirmed in error.] Austin v. Culpeper, s. c., 2 Sho. 313. The same distinction is taken in Shower, 314, though it is not taken in Skinner, where the libel imputed perjury, and was therefore clearly actionable. 1 Ford, MS. 49, the case of Harman v. Delany, is reported more fully than in the printed report; and it is there said that it was so agreed by the court. 2 Ford, 78, 79, Bradley v. Methuen: it there appears that Lord Hardwicke recognized the distinction, though it was not absolutely necessary to the judgment, which there passed for the plaintiff. There is another principle upon which the action for slander is to be maintained beyond that of penalty and punishment, viz., of disgrace and discredit; and whether that be produced by writing, or by words, if it is punishable by indictment as tending to a breach of the peace, it is also the subject of a civil action, which may be brought to recover a compensation for the injury the plaintiff sustains by being deprived of society, as for a temporal damage. 2 Wils. 403, Villers v. Monsley. Bathurst, J., held that writing and publishing any thing of a man that renders him ridiculous is a libel, and actionable; and fully recognized the distinction between written and spoken slander. This case continues the chain from the time of Hale, C. B., 1670, to the time of Wilmott, C. J., within living memory. Bell v. Stone, 1 Bos. & P. 331. The court, in the absence of Eyre, C. J., clearly held that written words of contumely were

actionable. [MACDONALD, C. B. "Villain" was the word there.] This brings us down to *Kaye v. Bayley*,¹ where the amount of damages made the question of importance, and it was thrice fully argued. If this series of one hundred and fifty years' decisions (and it was a very learned person, Le Blanc, then sergeant, who refused to argue the point in *Bell v. Stone*) will not suffice to warrant the opinion that an action will lie in such case, there is no reliance to be placed on authority. If words imputing a dereliction of every duty of imperfect obligation cannot be made the subject of an action, the law of libel very imperfectly guards society.

Barnewall, in reply. The court will not be disposed to extend the principle laid down in all the books, limiting the cases in which words are actionable. In 1 Roll. Abr. Case for Slander, and Com. Dig. Action on the Case for Defamation, the written and spoken slander are treated of under one title; and in the older entries there is no difference made in the declarations between written and unwritten slander, except using the word "spoken," instead of "written." In *Villers v. Monsley*, the words imputed an infectious disorder. In *Harman v. Delany*, the words were spoken of the plaintiff in his trade as a gunsmith. De Grey, C. J., in Wils. 187, says that to impute to any man the mere defect or want of moral virtue, moral duties, or obligations, which render a man obnoxious to mankind, is not actionable. The case in *Anderson* is in point, that the words here used are not actionable. The injury consists in the evil done to the plaintiff in the minds of others; and if the words, when spoken, be not an injury, they cannot be when written. To hold otherwise would be to make the immorality, and not the damage, the ground of action. *Cur. adv. vult.*

MANSFIELD, C. J., on this day delivered the opinion of the court.

This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter, which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham, that

¹ One of the parties in that case having died pending the writ of error, no judgment ever was given.

being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house; that the plaintiff in error was church-warden, and that the defendant in error gave him notice of his agreement with Lord Douglas, and that the plaintiff in error, intending to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule: for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals were sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal; for myself, after having heard it extremely well argued, and especially in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives; and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer: for all these an action lies. But for

mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words if spoken would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So, it is argued that written scandal is more generally diffused than words spoken, and is, therefore, actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, — Lord Hardwicke, Hale, I believe, Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words if spoken would not sustain it. Com. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says, there is a distinction between written and spoken scandal. By his putting it down there, as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases; but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken. Upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action

could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.

Actionable Words.—In certain classes of cases an action for defamation may be maintained without proof of special damage to the plaintiff; and in these cases the words are said to be actionable *per se*. Mr. Starkie enumerates five classes of defamation of this character, namely:—

1. Where an indictable offence is imputed.

2. Where a contagious or infectious disorder is imputed.

3. Where an injurious imputation is made of the plaintiff in his office, profession, or business.

4. Where the words tend to the dishonour of the plaintiff.

5. Where the defamation is propagated by printing, writing, pictures, or effigy; in which case the injury is termed libel. Starkie, *Slander*, 98 (3d Eng. ed.).

(a.) *Historical.*—We propose to consider the subject of actionable words in the same order. But it is proper first to examine into the ground of liability in such cases. This is, however, one of the most perplexing branches of the law. It has well been said that there is no simple and general rule for determining what words will and what will not support an action. N. St. John Green, 6 Am. Law Rev. 594, in a valuable article on *Slander and Libel*.

As to the distinction between slander and libel, making all defamatory written words actionable, while only certain classes of spoken words, however severe, are the subject of an action, the writer just referred to remarks that no entirely satisfactory reason has ever been given. The reason often given,

that written defamation has a more extended circulation than spoken words, is frequently untrue; nor is the other position more correct, that the tendency of libel to cause a breach of the peace is more direct than that of slander. Hot words are more apt to bring men to blows than the cooler imputations of written defamation. The presence and speech of the offending person stirs the passions to swift punishment; while in the case of a libel the blood has opportunity to cool, and reason to gain control, before the libeller is met.

In the article above referred to, the author, having further shown how unsatisfactory are most of the reasons given in particular cases for the liability of a party uttering slanderous words, proceeds to investigate into the origin of the doctrine concerning actionable words. The argument is ingenious; but it bears evidence, certainly, of probability. It is this: Defamation was originally a spiritual cause, cognizable only in the ecclesiastical courts. Afterwards, by the Statute of Westminster the Second, process was invented by which delicts not committed with force, such as slander and libel, could be brought before the common-law courts. Now, according to Bracton, says Mr. Green, it was the rule of the courts, ecclesiastical and civil, that the *accessorium* must come under the same law and jurisdiction as the *principale*; that is, the jurisdiction over a thing drew to it the jurisdiction over all things accessory. It was by means of this rule that the Court of King's Bench, by the fiction that the

defendant was in its custody, and the Court of Exchequer, by the fiction that the plaintiff was indebted to the crown, were enabled to extend their jurisdiction over most of the matters originally cognizable only in the Common Pleas. So, upon this rule, the common-law courts appear to have worked in getting from the spiritual courts jurisdiction in matters of defamation, when after the establishment of actions upon the case they themselves had the means of determining such classes of injuries.

But how did it come to pass that certain words were actionable, while others equally odious were not? This inquiry is answered thus: First, as to words charging an indictable offence. The courts of common law having acquired jurisdiction in matters of defamation as above indicated, and having the duty cast upon them of investigating charges of crime for the purpose of punishing the offender, this jurisdiction might well be held to draw after it as an incident the right to investigate the charge, for the purpose of compensating the party injured by such a charge if it were false. And this may explain why it was held that the imputation and charge of crime must be direct. For example, to call one a thievish knave imputed a disposition to commit crime, and not the actual commission of it; and as there was nothing upon which the jurisdiction of the court in such case could attach, the offender went free, or the complainant had to resort to the spiritual courts.

It is next suggested that the reason why to impute to one the present having of the leprosy, the syphilis, or the plague was actionable, while it was not actionable to charge upon the plaintiff the having of other diseases, or even

the having *had* the diseases named, may be accounted for in the same way.

"When a person became affected with the leprosy, he was considered as legally and politically dead, and lost the privileges belonging to his right of citizenship. The church took the same view; and on the day on which he was separated from his fellow-creatures, and consigned for the remainder of life to a lazaret-house, they performed over and around the yet living sufferer the various solemn ceremonials for the burial of the dead, and the priest terminated the long and fearful formula of his separation from his fellow-creatures by throwing upon the body of the poor outcast a shovelful of earth, in imitation of the closure of the grave." Encyc. Britannica, quoted by Mr. Green. The leper was also subject to the writ *de leproso amovendo*, proceeding from the king to the sheriff of London; and therefore the imputation of a disease coming under the notice of an officer of justice might well have been attended with the same consequences as the charge of a crime. And the same explanation may be true of a charge of the plague. As to the imputation of syphilis, the explanation is more difficult. Whether the syphilitic were also liable to a writ of removal, because of a resemblance to the leprosy then prevailing in England, or whether by reason of the great disgrace it brought, the imputation of it was held actionable, is not clear. (It may be worthy of notice in this connection, that one of the articles of impeachment of Cardinal Wolsey alleged his having whispered in the king's ear, knowing himself to be affected with venereal distempers. Hume's Hist. of England, vol. iii. App.)

Thirdly, as to words spoken of a

person in his office, profession, or business. The early cases appear all to relate directly to the administration of justice; and to bring these within the jurisdiction of the courts would not of course be difficult. And this would be true not only where the charge was against one of the judges, but also where it was against an attorney, since attorneys are officers of court.

As to all these cases, the ground of a pecuniary loss appears to be an idea which originated after the Reformation, when the common-law courts had taken away nearly all the jurisdiction of the ecclesiastical courts. But upon this principle (which, the common-law courts claimed, gave jurisdiction in all cases, as being a temporal cause) the number of actionable words in the third class appears to have been allowed to increase and to embrace many words not regarded as actionable in the early law; so that now it has come to be a general principle that defamatory words spoken of a man in his occupation are actionable.

As to libel, this offence appears to have been indictable from the earliest times. Before the invention of printing, libels were published by scattering the papers containing them in the streets, or by posting them in public places; and they were generally directed against the government, or against persons in high authority. "When the knowledge of reading and writing became common," says Mr. Green, "and the less injurious kinds of private libel came to the attention of the courts, they naturally would be held to be indictable as coming within the definition of the crime sanctioned by precedent. . . . After the introduction of the action upon the case, the court could consistently give a civil action for dam-

ages both upon the ground that the principal matter (that is to say, the crime) being within its jurisdiction, that fact drew after it a civil remedy in damages as an incident, and also upon the ground that, having by the usual fiction the possession of the criminal's person, it was proper that a civil remedy should be sought against him in the court where he was, rather than that the plaintiff should be sent to the ecclesiastical court for a redress which that court, without the custody of the person of the delinquent, might be powerless to give."

We now proceed to consider the subject as actually developed in the cases.

(b.) *Mitiori Sensu*.—It should be remarked at the outset that the decision of Lord Mansfield in *Peake v. Oldham*, exploding the notion that ambiguous words which were made to cover almost every charge should be construed *mitiori sensu*, has been uniformly followed; and now words of doubtful import, before as well as after verdict, are to be taken in their natural sense, as they would be understood by the bystanders or readers. *Hankinson v. Bilby*, 16 Mees. & W. 442; *Roberts v. Camden*, 9 East, 98; *Dorland v. Patterson*, 23 Wend. 422; *Tuttle v. Bishop*, 30 Conn. 80; *Hancock v. Stephens*, 11 Humph. 507; *Fallenstein v. Boothe*, 13 Mo. 427; *Duncan v. Brown*, 15 B. Mon. 186; *post*, 119, 120.

It is therefore immaterial whether the defamatory charge be affirmative and direct, or only inferential; as where it is made ironically: *Cooper v. Greely*, 1 Denio, 347; or by hieroglyphics, or in allegory: *Holt, Libel*, 245; or by fictitious names, or any other artful disguise: *Commonwealth v. Child*, 13 Pick. 198. It is enough that the language is understood to be de-

famatory by those to whom it is addressed.

(c.) *Where an Indictable Offence is imputed.*—We should expect to find, from what has been said above, that the sole ground of liability in cases of this class lay in the fact that an offence had been charged upon the plaintiff, for which, if true, he was then liable to an indictment; but this is not the case. In *Carpenter v. Tarrant*, Cas. temp. Hardw. 339, the words charged were, "Robert Carpenter was in Winchester jail, and tried for his life, and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A., and stealing his bacon." After verdict for the plaintiff, counsel for the defendant moved in arrest of judgment that the words were not actionable; but the motion was overruled. The words, it will be observed, implied that the plaintiff had been acquitted; and the language of Lord Hardwicke indicates that the early rule of law had been enlarged. "This," said he, "is one of those cases that are frequent, in which the difference betwixt the old rules and the modern ones come in question; and I should think that, according to all the rules laid down of late years, these words are actionable, for they import a scandal. The very charging a man of having been in jail is a reproach; and it must be a very strong intendment to have them mean only that he was acquitted by Leggat." And he referred to the similar case of *Halley v. Stanton*, Croke Ch. 268, where the words were, "He was arraigned for stealing twelve hogs, and if he had not made good friends, it had gone hard with him;" which words were held actionable.

In *Gainford v. Tuke*, Croke Jac. 536, an action of slander was sustained

where the words were, "Thou wast in Launceston jail for coining." The plaintiff replied: "If I was there, I answered it well." "Yea," said the defendant, "you were burnt in the hand for it."

Much later, in the case of *Fowler v. Dowdney*, the words, "he is a returned convict," were held actionable by Lord Denman; for, said he, though the words import that the punishment has been suffered, the obloquy remains. So in *Boston v. Tatham*, Croke Jac. 623, the court expressed the opinion that, even allowing that the words fixed the offence to a period since which the liability to punishment must have been discharged by a general pardon, yet that the words were actionable, since the scandal of the offence remained. See also *post*, p. 112; *Helsham v. Blackwood*, 11 Com. B. 111.

These cases have been followed in this country. In *Shipp v. McCraw*, 3 Murph. 465, where the charge was of a larceny committed in another State, Mr. Justice Henderson said that the *gravamen* of the action was social degradation. The risk of punishment and the rule to test the question, whether the words were actionable (by charging an infamous crime), were resorted to in order to ascertain whether a social degradation was alleged, and not whether the risk of punishment was incurred. The cases, which were numerous, where the words imputed a crime, and, at the same time, stated a pardon or acquittal, fully proved that the degradation, and not the danger of punishment, was the basis of the action. And this was fortified by the precedents, where the ground of complaint was the loss of character, and not the danger of punishment.

Mr. Townshend has collected many other cases of this kind to the same ef-

fect (Slander, § 158); among them *Smith v. Stewart*, 5 Barr, 372, where the words were, "He is a convict, and has been in the Ohio penitentiary;" *Wiley v. Campbell*, 5 Mon. 396, where the words were, "You have been cropped for felony;" and *Holley v. Burgess*, 9 Ala. 728, where the words were, "He was whipped for stealing hogs."

Whether the words, to be actionable, must charge an offence the punishment of which is infamous, has been a point of some conflict in the authorities. In *Turner v. Ogden*, 2 Salk. 696, the words, "thou art one of those that stole my Lord Shaftesbury's deer," were held not actionable *per se*, on the ground that the punishment of the offence, though it was by imprisonment, was not infamous. So in *Onslow v. Horne*, 3 Wils. 186, De Grey, C. J., said that the words "must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor." And Mr. Justice Lawrence quotes this statement as the true rule (*Holt v. Scholefield*, 6 T. R. 691, 694), and says that the *dictum* in *Smale v. Hammon*, 1 Bulstr. 40, — that where the words tend to the infamy, discredit, or disgrace of the party, they shall be actionable, — goes too far.

The doctrine of these cases has been followed in Pennsylvania. In *Andres v. Koppenheaver*, 3 Serg. & R. 255, the slanderous words alleged were, "You have made a libel, and I will prove it with my whole estate;" and the action was sustained. Tilghman, C. J., said he was inclined to think it was going too far to say that all words were actionable which imported an indictable offence. An action could not be maintained for charging one with having committed an assault and battery. (See

Billings v. Wing, 7 Vt. 439, where the assault charged was of an aggravated character.) "It seems," said he, "that there should be something in the offence of an infamous or disgraceful nature; either a felony or a misdemeanor which affects one's reputation." And he thought that the punishment for libel came within this rule. "The punishment at common law was infamous or otherwise at the discretion of the court. It was sometimes punished with fine or imprisonment, or both, and sometimes with the pillory." And, as to the view taken of it in society, it indicated, in its most favorable light, an unfeeling, malicious heart. But when it rose to the higher degrees, it was infamous in the extreme. See also *Bloom v. Bloom*, 5 Serg. & R. 391; *Todd v. Rough*, 10 Serg. & R. 18; *Beck v. Stitzel*, 21 Penn. St. 522.

In *Young v. Miller*, 3 Hill, 21, this was held to be the rule though the offence were a mere misdemeanor, unknown to the common law. In that case the words were, "You have removed my landmark, and cursed is he that removeth my landmark;" and the action was sustained. Mr. Justice Bronson referred to several cases: to *Widrig v. Oyer*, 13 Johns. 124, where counsel proposed to modify the rule in the principal case, *Brooker v. Coffin*, by changing the word "or" to "and," but without avail; also to *Martin v. Stilwell*, 13 Johns. 275, where words were held actionable which charged the plaintiff with keeping a bawdy-house; and to *Gibbs v. Dewey*, 5 Cow. 503, where the charge was that the plaintiff had handed papers to a juror to influence or bribe the jury; and to *Alexander v. Alexander*, 9 Wend. 141, where the charge was that the plaintiff had forged the defendant's name to a petition to the

legislature,—and this, though imputing only a misdemeanor, was held actionable. In all these cases, said the learned judge, the court went upon the ground that the words imputed a crime involving moral turpitude, for which the offender might be proceeded against by indictment.

These cases are all reviewed in *Smith v. Smith*, 2 Sneed, 473, and the Supreme Court of Tennessee there adopt the same rule, making no distinction in favor of misdemeanors, where the words involve an offence of moral turpitude. The particular point in the case referred to was that an action of slander would lie for words imputing to the plaintiff the unlawful selling of spirituous liquors to his slaves.

The same rule of law is adopted in New Jersey. *Johnson v. Shields*, 1 Dutch. 116. See also *Colby v. Reynolds*, 6 Vt. 489; *Hoag v. Hatch*, 23 Conn. 585; *Johnston v. Morrow*, 9 Porter (Ala.), 525; *Birch v. Benton*, 26 Mo. 153.

The court of Massachusetts, however, have refused to follow the rule in *Brooker v. Coffin*. See *Miller v. Parish*, 8 Pick. 384, where Parker, C. J., thus stated the rule: Whenever an offence is charged which, if proved, may subject the party to a punishment, though not ignominious, and which brings disgrace upon him, the accusation is actionable. The offence there charged upon the plaintiff, a female, was fornication; and it was held actionable, though neither a crime at common law, nor punishable by statute with an ignominious punishment.

A similar charge of unchastity has been held actionable in Connecticut, where the offence is punishable by statute. *Frisbie v. Fowler*, 2 Conn. 707. So in Wisconsin. *Meyer v.*

Schleichter, 29 Wis. 646. But, in New Hampshire, where it was not punishable, the court held the contrary. *Woodbury v. Thompson*, 3 N. H. 194. In New York the charge is not only not actionable, but no mental suffering or physical prostration and sickness, the effect of the charge, will be sufficient, as special damages, to make the action sustainable. *Terwilliger v. Wands*, 17 N. Y. 54; *Wilson v. Goit*, ib. 442. See also *Allsop v. Allsop*, 5 Hurl. & N. 584, to the same effect.

But whatever may be regarded as the true rule where the charge carries with it the odium of unchastity in a female, it is probable that in other cases the doctrine of *Brooker v. Coffin* would be accepted. The expression, "moral turpitude," was, however, criticised in *Skinner v. White*, 1 Dev. & B. 471, as lacking precision; while, in Pennsylvania, the court have remarked: "This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community." Mr. Justice Lowrie, in *Beck v. Stitzel*, 21 Penn. St. 522.

Upon this point Mr. Starkie is at variance with the current of American authorities, at least. He says: "In many of the cases where charges of crime have been held actionable, it is observable that stress has been laid upon the terms *scandalous* and *infamous*, used as descriptive either of the crime charged or the punishment appertaining to it. Although this affords some reason to infer that the actionable quality does not extend to all charges of misdemeanor for which fine and imprisonment may be inflicted, yet a distinction of this nature seems unwarranted by the cases, and would afford a

very dubious rule, the terms *scandalous* and *infamous* being of themselves words of very indefinite import. It would be a very difficult task to ascertain the precise point in the scale of offences where infamy and scandal cease to attach. From the authorities, perhaps, it may be inferred generally that to impute any crime or misdemeanor for which corporal punishment may be inflicted is actionable without proof of special damage. But where the penalty for an offence is merely pecuniary, it does not appear that an action will lie for charging it; even though in default of payment imprisonment should be prescribed by the statute, imprisonment not being the primary and immediate punishment for the offence. *Ogden v. Turner*, 6 Mod. 104; 2 Salk. 696; *Holt*, 40." *Starkie, Slander*, 111 (3d Eng. ed.).

(d.) *Where a Contagious or Infectious disorder is imputed.*—By the early common law, as we have already seen, the rule that the imputation of having a contagious or infectious disease was actionable without proof of special damage embraced three kinds of disease,—leprosy, the plague, and the syphilis. The two first named having nearly or quite disappeared in England, and having never prevailed to any extent in America, it may be doubtful whether an imputation of having either would have any effect upon a person; and therefore, *quære*, whether an action for such a charge could at the present time be maintained. To impute to one, however, the having a venereal disease is still actionable *per se*. And though the term usually employed to designate such disease is syphilis or pox (*lues venerea*), the law holds equally offensive the charge of having the gonorrhoea. *Watson v. McCarthy*, 2

Kelly, 57; *Williams v. Holdridge*, 22 Barb. 398.

The doctrine that the charge, to be actionable, must be made in the present tense is well settled. *Bloodworth v. Gray*, 7 Man. & G. 384; *Starkie, Slander*, 143 (3d Eng. ed.).

(e.) *Where an Injurious Imputation is made of the Plaintiff in his Office, Profession, or Business.*—This class comprises a large number of cases. It is said that words uttered of a person in his office are actionable as well when the office is merely confidential and honorary as when it is productive of emolument. *Starkie, Slander*, 146 (3d Eng. ed.). The ground of action, as the writer referred to suggests, must be somewhat different in these cases. Where the office is one of profit, the ground of action is the pecuniary loss sustained; but where the office is merely one of honor, the ground would seem to be mainly the danger of exclusion which the charge, if true, would involve. Whether the degradation and the improbability of the party's being afterwards placed in offices of trust or profit might also be a ground for such cases, *quære*. See *Walden v. Mitchell*, 2 Ventr. 265, 266; *Onalow v. Horne*, 3 Wils. 188; *Pridham v. Tucker*, Yelv. 153; *Tuthil v. Milton*, ib. 158; *Kerle v. Osgood*, 1 Ventr. 50.

In England this case of words concerning a person in an office of mere honor or confidence includes words spoken of justices of the peace, physicians, and barristers. *Starkie, ut supra*. In these cases a distinction was formerly maintained between a charge of incompetency and one of corruption. See the judgment of Lord Holt in *Howe v. Prinn*, *Holt*, 653; s. c. 3 Salk. 694. But this distinction was denied by De Grey, C. J., in *Onalow v. Horne*,

3 Wils. 186, and probably no longer prevails.

The fact that the occupation is menial is of no importance. Thus, in *Seaman v. Bigg*, Croke Car. 480, the words, "Thou art a cozening knave, and hast cozened thy master of a bushel of barley," spoken of a servant in husbandry, to injure him with his master, were held actionable. See also *Terry v. Hooper*, 1 Lev. 115, where Kelynge, Wyndham, and Twysden, JJ., held that an action lies for speaking scandalous words of a lime-burner, or of any man of any trade or profession, be it never so base, if they are spoken of him with reference to his profession.

There seem to be some cases in which it is not necessary to allege that the words were spoken of the plaintiff in his occupation. It is said that this is true of words spoken of a servant, like the following: "He is a lazy, idle, and impertinent fellow;" for these words, though without reference to the person's service, cannot but affect his character as a servant, since no one would be willing to employ a person of idle and impertinent habits. *Starkie, Slander*, 157 (3d Eng. ed.).

So, too, it seems that, in some cases where the office, profession, or employment of the plaintiff requires great skill and talent, general words imputing want of ability are actionable; as in the case of words spoken of a barrister or a physician. *Peard v. Jones*, Croke Car. 382; *Gallwey v. Marshall*, 9 Ex. 294, 301; *Starkie, ut supra*. But even in these cases, if the words clearly show that they could not have injured the plaintiff in his profession, they will not be actionable without special damage. See *Doyley v. Roberts*, 3 Bing. N. C. 835, where the words, "He has de-

frauded his creditors, and has been horsewhipped off a race-course," spoken of an attorney, were held not actionable *per se*.

With the exceptions above mentioned, it must appear that the words complained of were clearly spoken of the plaintiff in his profession or business. See *Irwin v. Brandwood*, 2 Hurl. & C. 960; *Ayre v. Craven*, 2 Ad. & E. 2; *Pemberton v. Colls*, 10 Q. B. 461; *Gallwey v. Marshall*, 9 Ex. 294; *Southes v. Denny*, 1 Ex. 196; *Edsall v. Russell*, 4 Man. & G. 1090.

Where it is alleged that the slanderous words were spoken of the plaintiff in his occupation, and there is no apparent connection between the words and the occupation, it may be necessary to allege how the speaker connected the words with it. In *Ayre v. Craven*, 2 Ad. & E. 7, a physician sued for words imputing adultery to him, the declaration alleging the words to have been spoken of him in his profession. After verdict for the plaintiff, judgment was arrested on the ground that such words, though alleged to have been spoken of the plaintiff in his profession, were not actionable without special damage; and the court said that if the words were so spoken as to convey an imputation upon the plaintiff's conduct in his profession, the declaration ought to show how the speaker connected the imputation with the professional conduct. To the same effect are *James v. Brook*, 9 Q. B. 7; *Doyley v. Roberts*, 3 Bing. N. C. 835.

(f.) *Where the Words tend to the Dishonour of the Plaintiff.* — If the words tend to impeach a present title of the plaintiff, the action, though often called an action for slander of title, is not properly speaking an action of slander: it is simply an action for a false

representation, like that in *Pasley v. Freeman*, *ante*, p. 1, in which the plaintiff must show that the defendant made the statement falsely and fraudulently, and must prove special damages. *Malachy v. Soper*, *ante*, p. 42, and *note*.

Cases of actions for words tending to defeat an expected title are rare, and seem to have been confined to words impeaching the legitimacy of the birth of an heir apparent. *Starkie, Slander*, 164 (3d Eng. ed.). In *Humphreys v. Stanfield*, *Croke Car.* 469, the words were, "Thou art a bastard." And it was held by all the court that the action lay without proof of special damage. For, said the court, by reason of these words the plaintiff may be in disgrace with his father and uncle, and they, conceiving a jealousy of him touching the same, may disinherit him; and though they do not, yet the action lies for the damages which may ensue. *Jones, J.*, cited two other cases in which the same decision had been made, — *Vaughan v. Ellis*, *Croke Jac.* 213; *Banister v. Banister*, *Jones*, 388. See also *Turner v. Sterling*, 2 *Ventr.* 26; *Matthew v. Crasse*, 2 *Bulstr.* 89.

(g.) *Where the Defamation is propagated by Printing, Writing, Pictures, or Effigy; that is, in the Case of Libel.* — The distinction between slander and libel, as laid down in the principal case, *Thorley v. Kerry*, is well established. *Stone v. Cooper*, 2 *Denio*, 299; *Townshend, Slander*, §§ 176, 177 (2d ed.). And all written words which

tend to bring the plaintiff into ridicule, hatred, or disgrace are actionable, though if spoken they may not have incurred liability without special damage. *Ib.*; *Cooper v. Greeley*, 1 *Denio*, 347; *Woodward v. Dowsing*, 2 *Man. & R.* 74; *Parmiter v. Coupland*, 6 *Mees. & W.* 105; *Bennett v. Williamson*, 4 *Sandf.* 65; *Cox v. Lee*, *Law R.* 4 *Ex.* 284.

The ground of this distinction is probably that already stated. Libel had been indictable from the earliest times; and when the courts obtained a criminal jurisdiction of the subject, they drew after it a civil remedy in damages. Libels were, however, at first directed against the officers of government only;¹ and their publication was considered a very grave offence. How the jurisdiction came *in fact* to be extended, as libels came to be directed against private citizens, is not clear. Libels were probably held to be indictable within the definition, taken literally, of the crime as sanctioned by precedent, as is suggested, *ante*, p. 101. Various reasons have since been suggested to account for extending the jurisdiction, as that libels tend to a breach of the peace, and that they indicate great malice; but it may be questioned if the real reason, or rather motive, for thus enlarging the jurisdiction of the courts was not a desire to add to the king's revenue by the fines imposed upon the offenders. But whatever may have been the ground of the

¹ In the *Percy Relics*, first published in 1765, will be found a libellous ballad of Richard of Almaine, written by one of the adherents to Simon de Montfort, Earl of Leicester. Bishop Percy, in his preface to the ballad, says that it affords a curious specimen of the fact that the liberty assumed by the good people of England of abusing their kings and princes at pleasure was of long standing. The ballad was written in the year 1265, seven years before the passage of the statute of *Scandalum Magnatum*; and, in Barrington's *Observations on the Statutes*, p. 71, it is said to be not improbable that this libel might have occasioned that act. In later editions of *Percy's Relics*, however, it is said that there were other satirical poems of the kind of the same age with that of the libel on Richard of Almaine.

distinction between slander and libel, it now probably rests, though firmly, upon authority alone.

A few cases will serve to show the difference between slander and libel, — cases of actions for written words which could not be maintained for oral defamation, without special damage. In *Steele v. Southwick*, 9 Johns. 214, the plaintiff, it appeared, had been a witness in a certain action against the defendant; and the latter afterwards printed the following, directed at the plaintiff: "Our army swore terribly in Flanders, said Uncle Toby; and if Toby was here now, he might say the same of some modern swearers. The man at the sign of the Bible [the plaintiff] is no slouch at swearing to an old story." The language was held libellous. Though the words may not have imported perjury in the legal sense, the court observed, they held up the plaintiff to contempt and ridicule, as being so thoughtless or immoral as to be regardless of the obligations of a witness. The definition of libel given by Mr. Hamilton in *People v. Croswell*, 8 Johns. Cas. 354, was referred to as drawn with precision, — "a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals."

In a later case in New York it was held that the words, "Mr. Cooper [the plaintiff] will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there," published in the defendant's newspaper, were libellous. There was an innuendo averring the meaning of the words to be that the plaintiff was in bad repute in Otsego County; and the imputation was held to come within

the definition of libel adopted in *Steele v. Southwick*, *supra*. *Cooper v. Greeley*, 1 Denio, 347.

In *Lindley v. Horton*, 27 Conn. 58, the alleged libel charged the plaintiff as a school-mistress in having made a wilful, false statement to the school visitors in a matter in which it was her duty to give correct information, and with general untruthfulness; and it was held actionable in both particulars. The publication, it was said, had charged the plaintiff with being a liar; and this, according to *JAnson v. Stuart*, 1 T. R. 748, was actionable. See also *Adams v. Lawson*, 17 Gratt. 250, to the same effect.

In *Woodard v. Dowsing*, 2 Man. & R. 74, the action was for an imputation upon the plaintiff, an overseer of the poor, of oppressive conduct towards the paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour upon a particular tradesman; and the action was sustained, though the charge was not of a criminal offence.

Under the practice in England, however, since the case of *Parmiter v. Coupland*, 6 Mees. & W. 105, it seems to be a question of fact whether the words alleged are libellous. In the case referred to Mr. Baron Parke said it had long been the practice of the judges in civil as well as in criminal cases to define a libel before the jury, and leave to them the question whether the language complained of came within the definition. See also *Fray v. Fray*, 17 Com. B. N. s. 603; *Cox v. Lee*, Law R. 4 Ex. 284, 290; *Darby v. Ouseley*, 1 Hurl. & N. 1; *Baylis v. Lawrence*, 3 Per. & D. 526; *Chalmers v. Payne*, *post*, p. 113.

This practice grew out of the statute of 32 Geo. 3, c. 60, called Fox's

Act, which, however, relates in terms only to criminal cases of libel. And its operation is sometimes prevented by a demurrer to the declaration. In *Reeves v. Templar*, 2 Jur. 137, decided in 1838, a few years before *Parmiter v. Coupland*, in which the same learned baron gave an opinion, the court held on demurrer that the language charged was not libellous, *Parke, B.*, inclining to the contrary. See also *Shattuck v. Allen*, 4 Gray, 540. If, however, the decision were against the demurrer, the case would go to the jury. *Fray v. Fray*, *supra*; *Shattuck v. Allen*, *supra*. So, too, there are cases where verdicts for the defendant are set aside upon the ground that the matter was a libel, though the jury found it was not. *Parmiter v. Coupland*; *Hearne v. Stowell*, 4 Per. & D. 697.

The English practice, though approved in some American cases, as in *Shattuck v. Allen*, 4 Gray, 540, has been criticised in others. *Snyder v. Andrews*, 6 Barb. 43; *Matthews v. Beach*, 5 Sandf. 256; *Green v. Telfair*, 20 Barb. 11; *Hunt v. Bennett*, 19 N. Y. 173; *Pittock v. O'Niell*, 63 Penn. 253.

Referring to *Parmiter v. Coupland*, the court in *Snyder v. Andrews*, *supra*, say: "We cannot but remark . . . how readily one anomaly in practice leads to another. The judges refuse to instruct the jury whether a publication, clear and unambiguous in its terms, and confessedly a libel, falls within the definition of a libel, but leave it for the jury to decide, who find for the defendants; and then the court set aside the verdict as against law. If the question was properly for the jury, and fairly submitted, their decision should on principle be conclusive. If the court have the power to set aside the verdict when for the defendant, because

the jury have found against law, it seems to us the better remedy is to pursue the old practice of declaring the law before verdict, as in other civil cases, and thus preserve consistency in the system."

It is admitted, however, in *Matthews v. Beach*, *supra*, that there are cases in which the meaning and application of a libel ought to be determined by the jury; but this was said to be only where the meaning and application depended upon extrinsic facts, or where the terms of the publication were so ambiguous that they were as capable of being understood in an innocent sense as in one which would make them actionable. But where no extrinsic facts were necessary to be proved, and the words of the publication were not susceptible of being understood in any other than a libellous sense, the question was purely one of law. *Dilloway v. Tur-rill*, 26 Wend. 383, was explained on the ground that the words there in question were capable of being understood in an innocent sense. See also the language of *Abinger, C. B.*, in *Reeves v. Temple*, 2 Jur. 137, 138. And this seems to be the principle upon which the American cases generally have proceeded.

At common law no immunity is conferred upon the proprietors, publishers, or editors, as such, of books, newspapers, or other public prints. They are responsible for libellous matter in their columns, though the publication may have been made without their knowledge or against their orders. *Huff v. Bennett*, 4 Sandf. 120; *Dunn v. Hall*, 1 Ind. 344; *Andres v. Wells*, 7 Johns. 260; *Curtis v. Mussey*, 6 Gray, 261; *Sheckell v. Jackson*, 10 Cush. 25; *Davison v. Duncan*, 7 El. & B. 229.

In *Dunn v. Hall*, *supra*, the libel complained of was published in the absence of the defendant, the proprietor. It was in evidence that just before his departure for a distant place, he informed his foreman that the communication complained of would be presented for publication, and instructed him to have stricken out of it every thing of an objectionable, personal, or abusive character. The communication was, however, published as written, though the foreman objected to having it done; and the defendant was held liable. "It is plain," said the court, "from the general context of the decisions in cases of this kind that booksellers and publishers of newspapers are considered as standing in situations of peculiar responsibility, and [so] far from relaxing in their favor the general rule that all persons are bound so to carry on their trade or business as not to injure others, the courts of law have felt the necessity of applying it in their cases with the utmost stringency. . . . The law, however, in holding publishers of books and newspapers responsible for slanderous attacks upon private character, only carries out, with respect to them, the same principles which are applicable to injuries resulting from the transaction of other kinds of business. It is a general rule that a principal is liable for injuries resulting to others from his neglect, or the neglect or incompetency of his agent in the course of his employment, as well as for those resulting from his own positive or intentional acts. So it has been repeatedly held in the case of booksellers that, when a book or pamphlet containing slanderous matter was sold from the shop in the usual course of trade, the proprietor was responsible, and that it was no excuse that he was ignorant of

the contents, or that it was sold by a servant when the master was absent at a distance, and had no knowledge that such a book had ever been in his shop or was sold on his account."

The case of *Rex v. Gutch*, *Moody & M.* 433, was particularly referred to, where one of the defendants desired to show that he was innocent of any share in the criminal publication, as he was living more than a hundred miles away from the place of publication, and had no share in the management of the newspaper. And Lord Tenterden ruled that this was no excuse, and that one who derives a profit from, and who furnishes the means for carrying on, the concern, and entrusts the conduct of the publication to a person whom he selects, ought to be answerable even criminally, though it cannot be shown that he was individually concerned in the particular publication. The court also referred to *Andres v. Wells*, 7 Johns. 260, and *Rex v. Walter*, 3 Esp. 21, and then said: "According to the principles established by these cases, and we have no doubt of their correctness, the circumstances detailed in the present case afford no excuse for the appellants. If Mr. Dunn himself had been at home, and suffered one of his journeymen to insert the libellous article in his paper, under his own eyes, he certainly could not have excused himself by proving that he had given the journeyman private directions not to do so; and if he chose to leave the management of his business in the hands of a foreman, he must be held equally responsible for the neglect or incompetency of the latter in not obeying his instructions, and in suffering such a thing to be done. If publishers could avoid responsibility by telling their foremen not to admit any thing personal, and then absenting

themselves while a libel was inserted, they could very easily make the newspapers vehicles for the circulation of the most atrocious slanders with perfect impunity."

There are, perhaps, some limitations to this doctrine. In *Smith v. Ashley*, 11 Met. 367, the judge at *nisi prius* had charged the jury that, although the (newspaper) article complained of might have been intended by the writer to be libellous, and to apply to the plaintiff, yet if the defendant, as publisher of the paper, did not know to whom it applied, and had not heard the facts and reports in relation to the plaintiff; and if the article was published as a mere fancy sketch, and the defendant believed it to be so, he was not liable. And this instruction was sustained by the Supreme Court. The case was decided upon the authority of *Dexter v. Spear*, 4 Mason, 115. The facts of that case are not fully stated. The alleged libel, which is not set out, was a charge of criminal intercourse between the plaintiffs before marriage. The defendant contended, 1, that the publication was not a libel on any person; 2, that, if a libel, it did not refer to the wife; 3, that, if applied to the wife, it was not a malicious publication, since the defendant was not the author of it, and had no acquaintance with the plaintiffs. The court told the jury that one of the questions for them was, whether the publication was made by the defendant with a knowledge that it was libellous. And they were also instructed that the defendant could not protect himself from responsibility by pleading his ignorance of the real parties attacked if he knew the publication to be libellous.

The effect of these cases seems to be that if the communication were such

that the defendant, as a man of common intelligence, could not know that a libel was intended, and did not, in fact, know it, he would not be liable. And this is perhaps a sound limitation of the liability in such cases; for if the publishers of books and newspapers were required to know the real meaning of every apparently fanciful or humorous sentence printed, which might be understood to be malicious by a few, there would be an end of some valuable literature.

In *Andres v. Wells*, 7 Johns. 260, it was held that where the defendant had taken an assignment of a printing-press to secure the payment of a debt, the assignor retaining the sole possession and the entire control and management of the same, he had not such an ownership as would render him liable to an action as proprietor.

The foregoing principles are equally applicable to receivers in chancery of newspaper establishments; they become personally liable for any improper publication made during their management. *Marten v. Van Schaick*, 4 Paige, 479, 480, per Walworth, Ch.

Booksellers also are said to be liable criminally for defamatory matter contained in publications sold by them; and, if that be true, it would seem, *a fortiori*, that they would be liable in civil actions. See *Dunn v. Hall*, *supra*; *Townshend, Slander*, § 124; *Starkie, Slander*, pp. 432-434 (3d Eng. ed.). In the work last cited it is said that the wilful and intentional delivery of a libel, by way of sale or otherwise, as by a bookseller or hawker, is a sufficient publication, though the party so publishing did not know the contents. p. 432. And again, that an allegation that the defendant published the libel is satisfied by proof that it was published

by his agent, if an authority can be proved; and although an authority to commit an unlawful act will not in general be presumed, yet it is otherwise in the case of booksellers and others, where the book or libel is purchased from an agent in the usual course of trade. p. 433. The author refers to *Nutt's Case*, Fitzg. 47, 2 Geo. 2, where the defendant was tried on an information for publishing a treasonable libel. In that case it appeared in evidence that the defendant kept a pamphlet shop, and that the libellous publication was sold in the shop by the defendant's servant, for the defendant's use and account, in her absence, and that she did not know the contents of it, or of its presence in the shop. And yet the court held the defendant guilty of publishing the libel. The case of *Rex v. Almon*, 5 Burr. 2689, was also referred to as containing an extensive discussion of the liability of booksellers. The court there expressed the opinion that the sale of a libel in a bookseller's shop was *prima facie* but not conclusive evidence of a publication. "It does not, indeed, appear," says Mr. Starkie, "what would have been deemed by the court to be sufficient to rebut such *prima facie* evidence, and to excuse the owner; but it seems to be clear, from the general context of the decisions on this subject, that a bookseller is considered as standing in a situation of peculiar responsibility, and that he is liable criminally as well as civilly for libels sold in his shop in the usual course of business, though without his particular knowledge."

Whether this broad doctrine, at least in its criminal aspect, would be accepted in America may be questioned. And it is worthy of remark that Mr. Townshend cites no American authorities

either as to the supposed criminal or civil liability of booksellers. Even in England it seems that the doctrine has not always been accepted in its full extent. See *Chubb v. Flanagan*, 6 Car. & P. 431, where it was held that, if the publication consisted merely in selling a few copies of a periodical in which the libel was contained among the articles, it was a question for the jury whether the defendant knew what he was selling.

(h.) *Truth of the Charge*. — The truth of the words complained of, whether they be spoken or written, is always a defence to a civil action. *Baum v. Clause*, 5 Hill, 199; *Foss v. Hildreth*, 10 Allen, 76; *King v. Root*, 4 Wend. 113; *J'Anson v. Stuart*, 1 T. R. 748; *Alcorn v. Hooker*, 7 Blackf. 58; *Golderman v. Stearns*, 7 Gray, 181. This proceeds upon the ground that such evidence shows that the charge is not defamatory. A person has no right to a false character; and his real character suffers no damage from the truth.

In the first case cited it was held, in an action for slander in accusing the plaintiff of having stolen an axe several years before, that the defendant could justify by proving the truth of the charge, though the plaintiff, after conviction of the offence, had been pardoned. It appeared, too, that the plaintiff had so far retrieved his character as to have become an inspector of elections; and the court, therefore, reached their conclusion with regret. "But our laws," it was said, "allow a man to speak the truth, although it be done maliciously." As to the effect of a pardon, *Cuddington v. Wilkins*, Hob. 67, 81, was distinguished and criticised. See *Boston v. Tatham*, *ante*, p. 102.

But under the common-law pleading the truth of the charge must be specially pleaded, and cannot be given in evi-

dence under the general issue, either in bar or in mitigation of damages. *J'Anson v. Stuart*, 1 T. R. 748; *Smith v. Smith*, 8 Ired. 29; *Van Ankin v. Westfall*, 14 Johns. 233; *Townshend, Slander*, p. 327, note 4 (2d ed.).

It is equally well settled that, when the communication is not privileged, belief in the truth of the language used is not a defence to the action. *Campbell v. Spottiswoode*, 3 Best & S. 769; *Darby v. Ouseley*, 1 Hurl. & N. 1; *King v. Root*, 4 Wend. 113; *Sans v. Joerris*, 14 Wis. 663; *Holt v. Parsons*, 23 Texas, 9; *Moore v. Stevenson*, 27 Conn. 14; *Smart v. Blanchard*, 42 N. H. 137.

And there is no exception in favor of the editors or publishers of newspapers; belief in the truth of scandal published by them is as unavailing as if it had been uttered in any other way. *Smart v. Blanchard*, 42 N. H. 137; *Campbell v. Spottiswoode*, *supra*.

Non-actionable Words. Special Damage.—The subject of defamatory words not actionable *per se* may be dis-

missed with the statement that all such words become actionable upon proof of special damage. *Townshend, Slander*, § 197 (2d ed.), and cases cited. And by special damage is meant damage which is the natural and usual result of the injury; as the loss of *consortium* of the husband upon charging the wife with unchastity: *Lynch v. Knight*, 9 H. L. Cas. 577; or, in the case of an unmarried female, the loss of the hospitality of friends: *Moore v. Meagher*, 1 Taunt. 39; *Williams v. Hill*, 19 Wend. 305. See *Beach v. Ranney*, 2 Hill, 309; *Roberts v. Roberts*, 33 Law J. Q. B. 250. So of the loss of a marriage. *Davis v. Gardner*, 4 Coke, 16; *Matthew v. Crass*, Croke Jac. 323.

Mere mental or physical suffering, and expenses of recovery, are not special damage. *Allsop v. Allsop*, 5 Hurl. & N. 534; *Lynch v. Knight*, 9 H. L. Cas. 577; *Wilson v. Goit*, 17 N. Y. 442; *Terwilliger v. Wands*, ib. 54, overruling *Bradt v. Towsley*, 13 Wend. 253, and *Fuller v. Fenner*, 16 Barb. 333.

CHALMERS v. PAYNE *et al.*

(2 Crompt., M. & R. 156; s. c. 5 Tyrwh. 766. Exchequer, England, Easter Term, 1835.)

Report of Trial injurious on its Face. Malice in Law. In an action for a libel, on not guilty pleaded it appeared that the libel (which was contained in a newspaper) purported to be the account of the trial of a former action, brought by the same plaintiff for a libel against third parties; and, after stating the libel in the original action, and the facts proved by the then defendants, and the summing up of the judge, stated that the jury found a verdict for the plaintiff, with 80*l.* damages. No evidence was given as to any such trial having, in fact, taken place, or whether the report was fair or not. The judge left it to the jury to say whether the report, although it contained some allegations injurious to the plaintiff, was, if taken altogether with the statement of the verdict being in his favor, injurious to the plaintiff on the face of it; and the jury having found for the defendant, the court refused to grant a rule for a new trial.

THIS was an action against the defendants for a libel, published by them in the "Morning Post" newspaper.

The libel for which this action was brought professed to contain the account of the trial of an action, brought by the present plaintiff against the proprietors of the "John Bull" for a libel. After stating what the libel was, and the facts proved at the trial by the defendants in the original action, under a justification, together with the summing up of the Chief Justice in that action, it stated also that the jury found a verdict for the plaintiff, with 30*l.* damages. The defendants in the present action pleaded the general issue.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after last Hilary Term, the newspaper containing the report was read in evidence, but no evidence was adduced to show whether the trial had taken place or not, or whether the report was or was not a fair and impartial report of the trial. The learned Chief Baron left it to the jury to say whether the statement was made in such a manner as to show that it had been published with a malicious motive, or whether it was injurious to the plaintiff's character; and if they thought it was, then to find a verdict for the plaintiff, but if otherwise, for the defendants. The jury found a verdict for the defendants.

Stammers now moved for a new trial, on the ground of misdirection, and of the verdict being against the evidence. It ought not to have been left to the jury to consider whether this statement was published from malicious motives or not, it not being in the nature of a privileged communication, and there being no justification on the record that was not in issue. [LORD ABINGER, C. B. There was no evidence that it was a mere pretended report of a fictitious trial. I told the jury that if they thought the statement of the facts proved at the trial were misstated, so as to be injurious to the plaintiff's character, or were published maliciously, then they ought to find for the plaintiff.] It is submitted that the question of malice was not a question which ought to have been left to the jury, but was a necessary inference of law from the libel itself. *Bromage v. Prosser*, 4 B. & C. 247. Besides, there was no evidence to show that there had been any such trial as that reported. [LORD ABINGER, C. B. I put it to the jury, that if they thought that the defendants had invented it, and that there had in fact been no trial at all, then

they must find for the plaintiffs; but there was no evidence that it was so.] If there had been such a trial, the defendants were bound to plead it in justification, and that the report was a correct account of it; but it not having been pleaded, must be taken not to have existed, and the jury ought to have been directed to find for the plaintiff, the publication of the libel having been proved.

LORD ABINGER, C. B. I am of opinion that there is no ground for a rule in this case. The question is, whether the whole publication taken together is injurious to the character of the plaintiff. I apprehend that where a publication is injurious on the face of it, it is a wrong from which malice will be inferred, and which makes it actionable whether any injury was intended or not. That is a principle which is not confined to libel only, but is a general principle applicable to other cases. A party is not justified in committing an action injurious to another because the party does not mean to do any injury. [The learned Chief Baron here referred to the case of *Littledale v. The Earl of Lonsdale*. See 2 H. Bl. 269.] But there may be cases where there is actual and wilful malice in addition to the injury itself; and that aggravates the wrong, and the jury in such a case ought to award greater damages. The first question, however, for them to determine in case of libel is, whether the publication is injurious to the character of the plaintiff. The statement may be made in such a manner as to be injurious to the plaintiff's character, or it may not be calculated to injure him. In criminal cases, in modern cases, it is expressly provided that the jury shall say whether the publication is a libel or not. I think most properly so. Who can tell so well what is the effect of an alleged libel on a man's character as a jury taken impartially from persons in his own station and rank of life? In this case I left it to the jury to say whether the report, though it might contain some allegations prejudicial to the plaintiff, yet if taken altogether with the verdict in his favor, was on the face of it injurious to the plaintiff; and if they thought it was not, I directed them to find for the defendants. If, on the contrary, they thought that the statement of the verdict being in his favor was no palliation, and that it was on the whole injurious to his character, to find a verdict for him. The jury took the report out with them, and found it was not.

BOLLAND, B. In the case of *Dicas v. Lawson*, which occurred

here in the last term, this court came to a similar decision to the present.

ALDERSON, B. In *Dicas v. Lawson* I directed the jury to look to the whole of the publication to see whether it was calculated to injure the plaintiff's character. The publication there complained of was the report of a trial, in which there were strong observations on the character of the plaintiff, but in which the plaintiff had recovered a verdict for 30*l*. It was said that the report was libellous, because it set forth the charge made on the trial against the plaintiff. I left to the jury to say whether, taking the whole of the publication altogether, they thought it likely to depreciate his character. The jury thought not; and, on an application for a new trial, this court approved of my direction. I quite agree that where slanderous words are used, which are actionable in themselves, and no justifiable cause is shown for uttering them, the law will presume malice from the language itself. But the question here is, whether the matter be slanderous or not, which is a question for the jury, who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together. Then it is said that there is no evidence of there having been such a trial in fact. But we cannot suppose that was a mere invention; we cannot assume that newspapers publish mere imaginary accounts of trials. The question being left to the jury, whether there was any thing in the mode of publication which indicated malice, was an additional advantage to the plaintiff.

*Rule refused.*¹

Malice in Law. — The machinery by which an action of slander or libel is worked out, in the fiction of malice, has been shown to be cumbersome and useless. To constitute slander or libel, the law says that malice implied or express is essential. The former is called malice in law; and this is said to consist in speaking defamatory words without legal excuse. "Why," says a learned writer, "is it not as simple to say, the speaking defamatory matter without legal excuse is actionable as it is to say, defamatory matter to be actionable, must be malicious, but the law implies malice? What need is there of bringing into the law of slander the cumbrous machinery of malice for the sole purpose of necessitating the construction of other machinery —

¹ As to the English practice of leaving the construction of the language to the jury, see *ante*, p. 108. The principal case is here given to illustrate simply the presumption of malice.

the machinery of legal implication—to take it out again?” Mr. N. St. John Green, 6 Am. Law Rev. 597.

The same writer proceeds to show how the fiction of implied malice probably arose. Defamation appears at first to have been a spiritual cause, cognizable solely in the ecclesiastical courts. “Not only defamatory matter which is now actionable at law was actionable in the spiritual court, but that court had jurisdiction over all injurious language, whether verbal or written. Indeed, it is hard to see how courts of law could entertain suits for defamation; for such suits could not (as far as we at the present time have the means of judging) be brought within the form of any then known action.”

By the statute of 13 Edw. 1, called the Statute of Westminster the Second, empowering the chancery clerks to form new writs, a process was given by which delicts similar to trespasses not committed by force, such as slander and libel, could be brought before the common-law courts; and this seems to have laid the beginnings of their jurisdiction.

Now the judges of the spiritual courts, according to their education, followed the Roman law; by which to constitute an injury an *animus*, or intention, to do wrong was necessary. Accordingly, in the canon law a bad intent, called *malitia*, was necessary to constitute defamation. “The defendant was punished *pro salute animæ*; and the matter was not looked at in a legal, but in a moral point of view, to see if the speaking of the words was a sin. When courts of law took jurisdiction of defamation, they seem to have applied to this *animus* of the Roman or *malitia* of the canon law

the elaborate scholastic structure of malice which was being framed in the common law [in homicide]; and the doctrine of implied malice was introduced into the law of slander.” See the article above referred to.

Taking now the cases as we find them, malice in the law of slander and libel is of two kinds, — malice in law and malice in fact. The first is presumptive; the second is actual. Malice is, indeed, presumed in all cases of legal slander and libel; but the presumption may often be rebutted; and then the plaintiff can recover only by proof of actual malice. The presumption in most cases is only *prima facie*; and the general rule may be thus stated: A false and defamatory statement of another, made in the presence of third persons, is presumed, *prima facie*, to have been made of malice, and justifies a verdict for the plaintiff. *Brown v. Croome*, 2 Stark. 297; *Cooke v. Wildes*, 5 El. & B. 835, Erle, J.; *Hooper v. Truscott*, 2 Bing. N. C. 457; *White v. Nicholls*, 3 How. 266; *Hatch v. Potter*, 2 Gilman, 725; *Long v. Eakle*, 4 Md. 454; *McKee v. Ingalls*, 4 Scam. 30; *King v. Root*, 4 Wend. 113; *Sans v. Joeris*, 14 Wis. 668.

If the words were not uttered upon a justifiable occasion, or if they were not true, the defendant will not be allowed to deny any inference of malice which they may of themselves clearly raise. In other words, the defendant, having no other justification, will not be permitted to deny that there was malice in his mind when the language used is defamatory. This is doubtless what Mr. Justice Bayley means when he says, “In an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as es-

essential; nor is there any instance of a verdict for a defendant on the ground of want of malice." *Bromage v. Prosser, post.*

Upon this point a learned writer says: "It seems to be clear, as well upon legal principles as on those of morality and policy, that where the wilful [voluntary?] act of publishing defamatory matter derives no excuse or qualification from collateral circumstances, none can arise from a consideration that the author of the mischief was not actuated by any deliberate and malicious intention to injure beyond that which is necessarily to be inferred from the very act itself. For if a man wilfully does an act likely to occasion mischief to another, and to subject him to disgrace, obloquy, and temporal damage, he must, in point of law as well as morals, be presumed to have contemplated and intended the evil consequences which were likely to ensue." *Starkie, Slander*, 300 (3d Eng. ed.).

The point arose in *Hooper v. Truscott*, 2 Bing. N. C. 457; s. c. 2 Scott, 672. There the defendant, having some cause for suspicion, went to the plaintiff's relatives, and charged the plaintiff with theft. And though it appeared that the defendant's object in so doing was to induce the plaintiff's friends to compromise the matter, it was held that the existence of malice must be implied, and could not be left as a question for the jury.

In *Hatch v. Potter*, 2 Gilman, 725, an ordinary action for slander, in imputing fornication to the plaintiff's wife, counsel for the defence asked a witness if the defendant spoke the words in jest or in earnest; and the plaintiff then asked, "Did the manner of the defendant in speaking the words indicate a desire to be believed or

not?" The court, on appeal, held the questions to be improper. "In point of law," it was remarked, "it is immaterial whether a party who slanders his neighbor designs or expects to be believed or not. He cannot be permitted, either carelessly or wantonly, to sport with the character of another, and then excuse himself upon the ground that he was not really in earnest, and did not intend that his auditors should credit his unfounded aspersions."

In an action in Maryland, for imputing the larceny of a hog to the plaintiff, the court below had instructed the jury that if they believed that the defendant spoke the words in jest, and without malice, they might find for him; which they did. And the instruction was held erroneous, though there was no evidence that the words were spoken in jest. It was manifest to the court that the jury in finding for the defendant, in such a case, had come to the conclusion either that the defendant was jesting, or (which was not pretended) that he had not used the language imputed to him. *Long v. Eakle*, 4 Md. 454.

But it cannot be true in all cases that the defendant cannot say that the words were jestingly uttered. That can only be the case where the words are clearly defamatory, and there is no justification in the attending circumstances. For instance, if one of my companions, in sport, pick my pocket, and, on discovering the trick, I apply, jestingly, never so severe and (had the occasion been different) opprobrious epithets, and he, taking offence, bring an action against me, alleging the words, there is no doubt but I can plead the circumstances, and show how the words were understood, in bar of the action.

The case of *McKee v. Ingalls*, 4

Scam. 80, is in point. There, the words were in themselves excessively defamatory; and the court below had refused to charge the jury that, if they were spoken in wantonness or jest, it was no excuse; and this refusal was sustained. "We are unanimously of opinion," say the court, "that merriment or jesting, without malice, is not actionable. It would be calculated to shake the well-settled doctrine that malice is the gist of this offence." The language of Hawkins on this point was quoted and doubted: "Also it hath been holden that he who repeats part of a libel in merriment, without malice, and with no purpose of defamation, is no way punishable. But it seemeth that the reasonableness of this opinion may be justly questioned; for jests of this kind are not to be endured, and the injury to the party grieved is no way lessened by the merriment of him who makes so light of it." Pleas of Crown, 356. c. 73, § 13.

It is not to be supposed, however, that the doubt of Hawkins is to be taken sweepingly of all cases; for where the circumstances show that the words were called out by sport, and were plainly meant in joke, and so understood, it is the common sense of the matter to say that they should be taken accordingly. It is enough that they are to be considered *prima facie* as malicious; to hold that they are conclusively so would often be oppressively false.

It is to be observed also that the court of Illinois did not say that it was always a good defence that the words were uttered in jest. "If such merriment and jesting *be malicious*," they add immediately after their above-quoted statement, "and with a purpose of defamation, it would certainly be

actionable." And before this, in reply to the refusal to charge as mentioned, they say that for want of the whole evidence they were unable to say whether there was any thing to support the instruction asked; and that courts could not be required to charge mere abstract propositions of law upon points concerning which there was no evidence.

There is an instructive case of Donoghue v. Hayes, Hayes (Irish), 265, on this point. That was an action of slander; the words spoken of the plaintiff being, "He was detected in taking dead bodies out of the church-yard. He was in confinement, and fined twenty pounds for stealing and sending dead bodies to England." The judge at *nisi prius* told the jury that if they believed the words to have been spoken jocularly, they should find for the defendant; but if they conceived that they had been spoken maliciously, that is, with intent to inflict injury, they should find for the plaintiff. A verdict having been given for the defendant, the same was set aside for misdirection.

Joy, C. B., said: "The principle is clear that a person shall not be allowed to murder another's reputation in jest. But if words be so spoken that it is obvious to every by-stander that only a jest is meant, no injury is done, and consequently no action would lie. If these words were used as conveying a serious imputation, I know of none which would injure a man more. No character could be more disgraceful than that of a body-snatcher. I think that the case has not been properly presented to the jury." Smith, B. "If a man in jest conveys a serious imputation, he jests at his peril. And in this case we must take it as if a serious imputation had been intended, no evi-

dence to the contrary being reported to us." And he added, that if the jury had understood the judge to mean by the term "jocularly" the use of the words in a way not calculated to do mischief, the charge would have been correct; but it was probable that the jury did not so understand him. "The whole question is," said Foster, B., "whether the jocularity was in the mind of the defendant alone, or was shared by the by-standers."

The effect of the decision was that the jury may have been misled by the term "jocularly," used as it had been, without explanation, and that they might have excused the defendant upon evidence that he merely was merry. This might be true while he was stabbing the plaintiff's character. The question should have been whether he was thus injuring the plaintiff; and this would be answered by the effect and impression produced upon the by-standers. If they understood him, however merry he might be, as imputing a crime to the plaintiff, he was liable.

In *Hankinson v. Bilby*, 16 Mees. & W. 442, the defendant, it appeared, had charged the plaintiff with being "a thief, and a bloody thief," and that he had "robbed Mr. Lake of 30*l.*, and would have robbed him of more," if he had not been afraid; and the learned baron told the jury that it was immaterial whether the defendant *intended* to convey a charge of felony against the plaintiff. The question was, whether the by-standers would so understand the charge. And this direction was sustained. "Words uttered," said the court, "must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individ-

uals, better informed on the matter alluded to, might form a different judgment on the subject." See *Perry v. Man*, 1 R. I. 263; *Smart v. Blanchard*, 42 N. H. 187; *Leonard v. Allen*, 11 Cush. 241; *Sasser v. Rouse*, 13 Ired. 142; *Hawks v. Patton*, 18 Ga. 52; *Phillips v. Barber*, 7 Wend. 439; *Smith v. Miles*, 15 Vt. 245; *Barton v. Holmes*, 16 Iowa, 252; *Smawley v. Stark*, 9 Ind. 386; *Nelson v. Borchenius*, 52 Ill. 236; *Curtis v. Mussey*, 6 Gray, 261.

The last-named case was an action for a libel; and the court held that the want of actual intent to vilify or libel the plaintiff rendered the publication no less a libel, if such was the natural effect of the words published. See also *O'Brien v. Clement*, 15 Mees. & W. 437; *Hankinson v. Bilby*, 16 Mees. & W. 442. That words are to be taken in their natural sense, and not necessarily *mitiori sensu*, see *ante*, p. 101. But see *Snell v. Snow*, 13 Met. 278; *Gibson v. Williams*, 4 Wend. 320; *White v. Sayward*, 33 Maine, 322, as to showing the sense in which the words were understood.

The conclusion from these cases is, that if there be no justification in the attending circumstances under which the words were uttered, the defendant will not be permitted to give evidence that in point of fact he uttered them without malice towards the plaintiff. He must find his defence in the circumstances and not in the state of his mind.

That the defendant's belief in the truth of the words is no defence, see *Campbell v. Spottiswoode*, 3 Best & S. 769; *King v. Root*, 4 Wend. 113.

In those cases (to be noticed hereafter) where the defence offered is an absolute one, and not merely *prima facie*, as in absolutely privileged communications, it is of course

immaterial that the language was maliciously used. Townshend, Slander, § 91 (2d ed.); note on Malice in Fact, *post*. In the following cases and notes the manner in which the presumption of malice may be rebutted will be considered.

HASTINGS v. LUSK.

(22 Wend. 410. Court of Errors, New York, December, 1839.)

Privilege. Trials. Language of Counsel. There are two classes of privileged communications, and the privileges of counsel sometimes fall within the one class and sometimes within the other. In the one class the law protects the defendant so far as not to impute malice to him from the mere fact of having spoken words of the plaintiff which are in themselves actionable, though he may not be able to prove the truth of his allegations. But the plaintiff will be able to maintain his action for slander if he can satisfy the jury by other proof that there was *actual* malice in the defendant, and that he uttered the words for the mere purpose of defaming the plaintiff. In the other class of cases, the privilege is an absolute shield to the defendant.

To the second class belongs the case of counsel in advocating the causes of their clients or their own causes, where they have confined themselves to what was relevant and pertinent to the question before the court.

ACTION for slander, charging the plaintiff Lusk with perjury in an examination before a magistrate, where the defendant Hastings had been charged with threatening to shoot Lusk. The defence, *inter alia*, was that the words were spoken by the defendant while conducting his own defence in said case, and that they were *relevant and pertinent* to the examination. There was also a plea of no malice. Replication traversing the pleas; issues thereon; and verdict for the plaintiff, with nominal damages. The jury found specially that the words were spoken falsely and maliciously, and that they were not relevant, and were not uttered in the course of his defence before the magistrate, but elsewhere.

Motion in arrest of judgment overruled; whereupon defendant took a writ of error from the Supreme Court.

M. J. Bidwell, for plaintiff in error. *W. C. Noyes*, contra.

THE CHANCELLOR. The principle involved in this case is of great importance to the community, inasmuch as it involves the rights and privileges of counsel and of parties in the investiga-

tion of suits and other proceedings before our judicial tribunals; and as I believe it is the first cause of the kind which has been brought before this court of *dernier ressort*, and has been very fully and most ably argued here by the counsel upon both sides, I have considered it my duty to examine the law on the subject more fully than would be necessary or proper in an ordinary case of mere verbal slander; for it is not only right and proper that parties and their counsel should know what their privileges are, but also that the law should be deliberately and correctly settled. In applying the principles of law to the case under consideration, we must, therefore, be careful on the one hand that we do not restrict counsel within such narrow limits that they will not dare to openly and fearlessly discharge their whole duty to their clients, or to themselves when they manage their own cases; and, on the other hand, we must not furnish them with the shield of Zeus, and thereby enable them with impunity to destroy the characters of whomsoever they please.

There are two classes of *privileged communications* recognized in the law in reference to actions of slander, and the privileges of counsel may sometimes fall within the one class and sometimes within the other. In one class of cases the law protects the defendant so far as not to impute malice to him from the mere fact of his having spoken words of the plaintiff which are in themselves actionable, though he may not be able to prove the truth of his allegations. But the plaintiff will be able to sustain his action for slander, if he can satisfy the jury, by other proof, that there was *actual malice* on the part of the defendant, and that he uttered the words for the mere purpose of defaming the plaintiff. In the other class of cases the privilege is an effectual shield to the defendant; so that no action of slander can be sustained against him, whatever his motive may have been in using slanderous words.

One of the earliest cases of the first class is Parson Prit's Case, reported by Rolle. 1 Roll. Abr. 87, pl. 5. Although the report of this case is very short, it will be perfectly understood by a reference to Fox's "Martyrology," where the author, in giving an account of the severe punishments inflicted by the vengeance of Heaven upon some of the persecutors of the Protestants during the reign of the Bloody Mary, states that Grimwood or Greenwood, as he is called by Rolle, one of the perjured witnesses who

was hired to swear away the life of John Cooper, an innocent person, who was convicted and hanged, was soon after destroyed by the terrible judgment of God, being suddenly seized while in perfect health, so violently that his bowel gushed out. From the report it appears that the defendant, Parson Prit, having been recently settled in the parish, and not knowing all his parishioners, in preaching against the heinous sin of perjury cited this case from the "Book of Martyrs;" and no doubt commented severely upon Greenwood, and upon White, his forsworn companion, who by their perjury had caused an innocent man to be drawn in quarters and his wife and children to be left desolate. It turned out, however, that Greenwood was not dead, and that, being a resident of that parish, he was present in the church and heard the sermon, and afterwards brought a suit against the parson for charging him with perjury. But the court held that it was a *privileged communication*, and the circumstances under which the words were spoken showed there was no actual malice towards the plaintiff. See also Cro. Jac. 91. This case has been followed by a numerous class depending upon the same principle, in which the speaking of the words is held to be a privileged communication, the occasion of the speaking being such, that *prima facie* there could have been no malicious intent to defame the person of whom they were spoken, and the interests of society requiring that the defendant should be permitted to speak freely in the situation in which he is placed, provided he confine himself within the bounds of what he believes to be the truth. In cases of this kind the defendant may avail himself of his privilege under the plea of the general issue, even under the new rules of pleading adopted in England. This was so decided in the recent case of *Lillie v. Price*, 2 Harr. & Woll. R. 381, in the Court of King's Bench; where Lord Denman, C. J., after taking time to consult with the judges, and referring to the new rule which declares the defence under the general issue in slander shall be the same as before, says: "We are all of opinion that this defence does not require to be pleaded specially. It goes to the very root of the action. It shows the party not guilty of malice, and consequently it is open to him without having pleaded it." The presumption in these cases, that there was no malice, is not rebutted by the plaintiff's merely showing that the charge against him was untrue in point of fact; it must be fur-

ther shown that the defendant either knew or had reason to believe it was untrue at the time of the speaking of the words complained of. *Kine v. Sewell*, 1 Horn & Hurl. 83; 3 Mees. & Wels. 297, s. c. Proving that the defendant knew the charge to be false would unquestionably be evidence of *express malice*, and would destroy the defence in this class of cases.

As the plaintiff has a right to prove express malice in such cases, to sustain his action, notwithstanding the privilege, it follows, of course, that if the defendant attempt to set up his privilege as a defence by a special plea, he must not only plead the fact which rendered it a privileged communication, but he must deny the allegation in the declaration, that the words were *maliciously spoken*, to enable the plaintiff to go to the jury upon the question of actual malice, if he thinks proper to do so. *Smith v. Thomas*, 1 Hodges' R. 353; 2 Bing. R. n. s. 372, s. c. It follows, of course, upon a motion in arrest of judgment, if the charge of malice was denied in the plea and issue taken thereon, or if the general issue only was pleaded, so that the plaintiff would be bound to prove express malice to entitle him to a verdict in this class of cases, the court must presume it was proved upon the trial; although it should appear from the declaration or other pleadings that it was *prima facie* a privileged communication.

The *second class of privileges* embraces words spoken by members of Parliament or of Congress or of the State legislature, in the discharge of their official duties in the House, for which no action of slander will lie, however false and malicious may be the charge against the private reputation of an individual. To this class, also, belong complaints made to grand juries and magistrates, charging persons with crimes, for which no action of slander will lie, although express malice as well as the absolute falsity of the charge can be established by proof. But the law has provided a different remedy in cases of that kind, where, in addition to what has before been stated, it can be proved that the party who made the complaint had no *probable cause* for believing that the charge was true. Upon a full consideration of all the authorities on the subject, I think that the *privilege of counsel* in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class where they have confined themselves to what was *relevant* and

pertinent to the question before the court, and that the motives with which they have spoken what was relevant and pertinent to the cause they were advocating cannot be questioned in an action of slander. Thus far it appears to be necessary to extend the privilege for the protection of the rights of the parties; as those rights might sometimes be jeopardized if counsel were restrained from commenting freely upon the characters of witnesses, and the conduct of parties, when such comments were relevant, for fear of being harassed with slander suits, and attempts to prove they were actuated by malicious motives in the discharge of their duty. Such I understand also to be the conclusion at which the Court of King's Bench arrived in the case of the present Lord Chief Baron of the Court of Exchequer. *Hodgson v. Scarlett*, 1 Barn. & Ald. 232; Holt's N. P. 621. Although Mr. Holt has attempted to give a statement of what occurred *in banc*, as well as a report of the case at *nisi prius*, to understand the decision correctly it is necessary to examine the case in *Barnewall & Alderson*, not only as to the final opinion of the judges, but also as to what occurred in the course of the argument. There was no question as to the fact that the plaintiff was nonsuited upon the opening, by Baron Wood, who held the assizes, without permitting him to go to the jury. He, therefore, had no opportunity to prove express malice, or to have it inferred from the manner in which the charge was made. His counsel upon the argument insisted that the learned judge had stopped the cause too soon, without hearing the evidence. To this it was answered, that Baron Wood had reported that the counsel at the assizes admitted that the alleged slanderous words were used by the defendant as observations in a cause, and were pertinent to the matter in issue. But as there appeared to have been a misapprehension on this point, the court heard a statement of the proceedings in the original suit from the notes of Mr. Justice Bailey, who tried the cause. The plaintiff's counsel still contended there was a question which ought to have been left to the jury, as they were to say whether there was not malice to be *inferred* from the facts. Upon which Lord Ellenborough immediately inquired if the words were relevant, whether they were not within the protection of law? And it was in answer to this part of the argument that, in delivering his final decision in the cause, he said, although he admitted it might have been

too much for the counsel to say that the attorney was wicked and fraudulent, "It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable."

I do not understand from this, however, that every thing that in any state of facts would be relevant and pertinent to the matter in question before the court, comes within this rule of protection; where those facts which would have rendered it relevant and pertinent do not exist. Thus, if counsel, in the argument of his client's cause, should avail himself of that opportunity to say of a party, or of a witness, against whom there was nothing in the evidence to justify a suspicion of the kind, that he was a thief or a murderer, it might be a proper case for a jury to say whether the counsel was not actuated by malice, and improperly availed himself of his situation as counsel to defame the party or witness. Such appears to have been the opinion of the judges in the case of *Hodgson v. Scarlett*, and such also must have been the opinion of the Supreme Court of this State in the case of *Ring v. Wheeler*, 7 Cowen, 725; for the language of the defendant as stated in any of the seven first counts of the declaration in that case might have been relevant and pertinent; and the words charged in the fourth and sixth counts probably were relevant to the matter before the arbitrators, if the counsel was opening his defence, and merely stating what he expected to prove, according to the case of *Moulton or Boulton v. Clapham*, 1 Rolle's Abr. 87, which was so much relied upon by the counsel for the plaintiffs in error upon the argument of this cause. Upon the authority of that case, perhaps, they should have been considered as relevant and pertinent, even after verdict.

I do not, however, consider the case of *Moulton v. Clapham* as an authority for holding that every thing which may be said to the court or jury, by a party or his counsel, in the progress of a cause, as absolutely protected, although it was not relevant or pertinent to the matter in question, so as to preclude the party injured thereby from showing to a jury that the language was used maliciously, and for the mere purpose of defaming him. Many of these old cases are very imperfectly reported, and are therefore apt to mislead us, unless they are examined with care. This case, although it is to be found in *D'Anvers*, *Sir William Jones*, *March*, and in *Rolle's Abridgment*, is not stated by either

two of them in precisely the same way. As reported by Sir William Jones, it would lead us to the conclusion that the court meant to decide that any thing said in court by a party in disaffirmance of what was sworn against him was absolutely protected, although found by the jury to have been said maliciously; but by referring to Rolle, it will be seen that the language used by the defendant was addressed to the court, and was a mere statement that the affidavit was untrue, and that he would prove to them by forty witnesses that it was so; and therefore it was holden that the action was not maintainable, as it appeared from the plaintiff's declaration that the answer as made by the defendant to the affidavit was spoken merely in defence of himself, and in a legal and judicial way, "inasmuch as he said he would prove it by forty witnesses." Neither is the *dictum* of Cromwell's Chief Justice of the upper bench (Style's R. 462) to be taken as broadly as stated by the reporter, without knowing the state of facts in reference to which the *dictum* was applied. I presume he must have used this language in reference to words spoken by counsel in opening the defence of his client's cause to the jury, stating what he should prove. For he immediately adds, "It is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." But surely no one can for a moment suppose the learned Chief Justice intended to say that it was the duty of counsel to say any thing that was not relevant to the matter in question; or to go beyond the case for the purpose of maligning a witness or the adverse party, although he might have been instructed to do so by his client. As I understand the case of *Brook v. Montague*, Cro. Jac. 90, the plea must have alleged that the words were spoken by the counsel in relation to the evidence which was *to be given* in favor of the jury against Brook, who had attainted them. He probably was instructed by his client that Brook had been convicted of felony; and if so, he was probably incapable of proceeding in the attaint against the jury, as the law then stood. Coke Litt. 130 a; *Sleght v. Kane*, 2 Johns. Cas. 236. The language of the reporter is, that the counsel spoke the words *in evidence*. This certainly could not be so, as there was no pretence that the counsel was a witness on the trial. I have no doubt, therefore, that the language of the plea was that the counsel, in reference *to the matters to be given in evidence*, spoke

the words mentioned in the plaintiff's declaration, &c., and that by a slip of the reporter's pen, or otherwise, a part of the sentence is left out in the printed report. The case of *Badgley v. Hedges*, 1 Penning. R. 233, is like that of *Moulton v. Clapham*; for it is evident the defendant spoke in reference to the contradictory evidence which he intended to give in the cause, or which he had already given. If so, what he said was relevant, although perhaps not said at the right time. I am satisfied, therefore, that there is no law, either ancient or modern, which affords complete protection to parties or counsel, so as to bring the language used by them in the course of judicial proceedings within the second class of privileged communications which I have stated, except where the words complained of as slanderous were relevant or pertinent to the question to be determined by the court or jury.

There may be cases which properly belong to the first class of privileged communications, arising in the course of judicial proceedings. Parties, and even counsel sometimes, misjudge as to what is relevant and pertinent to the question before the court, and especially parties who are not much acquainted with judicial proceedings; and it may be very proper in such cases to leave it as a matter of fact for the jury to determine, whether the words were spoken in good faith, under a belief that they were relevant or proper, or whether the party using them was actuated by malice and intended to slander the plaintiff. The case of *Allen v. Crofoot*, 2 Wendell, 516, appears to be a case of this kind, for it is evident that words spoken were not relevant in the judicial proceeding, or pertinent to any question then before the court. But as circumstances showed that the defendant either supposed he was bound to answer the question, or that it was relevant and pertinent to the proceedings, I think the court very properly decided that it should have been left to the jury to determine whether the defendant acted in good faith, supposing it was relevant and proper to answer the question put to him by the plaintiff, although he had not yet been sworn as a witness on the examination of the complaint which he had previously made on oath, or whether he was actuated by malice. In cases belonging to that class of privileged communications, malice in fact may be inferred from the language of the communication itself,

as well as from extrinsic evidence. *Wright v. Woodgate*, 1 Gale's R. 329.

But though the slanderous words were spoken in the course of a judicial proceeding, and were relevant and pertinent to the matter in question, or the defendant may have used them in good faith supposing them to be pertinent, without actual malice or any intention of slandering the plaintiff, yet if the facts do not appear from the pleadings or the finding of the jury, it will not aid the defendant upon a motion in arrest of judgment. On such a motion the court cannot know that the slanderous words were pertinent, or that the plaintiff did not satisfy the jury that they were not only pertinent to the matter in question before the court, but also that the defendant spoke them with a malicious intent, for the mere purpose of defaming the plaintiff and wounding his feelings. Such is the effect of the decision of the Supreme Court both in the case of *McClaghry v. Wetmore*, 6 Johns. R. 82, decided nearly thirty years ago, and the more recent case of *Ring v. Wheeler*, to which I have before referred.

Each of the counts in the plaintiff's declaration in this case contains more or less slanderous expressions, imputing the crime of perjury, in language which *prima facie* could not have been *pertinent* to any question before the court, for it does not appear to have been addressed to the court, but to the plaintiff himself, who was a witness there; and if the plaintiff used all the abusive language towards or in reference to the witness which is stated in either of those counts, although some of it might have been relevant to the matter in question, no jury could hesitate in coming to a correct conclusion whether that which was not pertinent was uttered in good faith or with a malicious intent to defame the plaintiff; although the defendant must have proved that he had great provocation to excuse all this harsh language, or no honest jury could have given a verdict of only six cents against him.

The defence in this case is set up by several special pleas in addition to the general issue; and the objection urged by the third point of the plaintiff in error is, that although the declaration may have been *prima facie* sufficient, the replications are bad, and sufficient is admitted upon the whole record to constitute a good defence. On the other hand, it is urged that if there are any immaterial issues the pleas are bad, and as the defend-

ant committed the first fault in pleading, it is not a case for a replender. I have examined the special pleas particularly, and think either of them would have been held good upon general demurrer, if I am correct in the conclusion at which I have arrived as to the law of the case. It is expressly stated by Mr. Justice Buller that the defendant may, by way of justification, plead that the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question, *or* he may give them in evidence under the general issue, for they prove him not to have been guilty of speaking the words maliciously. Bull. N. P. 10. See also Lord Cromwell's Case, 4 Coke's R. 14. The two first special pleas, therefore, showing that slanderous words stated in the declaration were spoken by the defendant in the judicial proceeding, while conducting his own defence without counsel, and that they were *pertinent* to the matter in question, constituted a good bar to the action, as they brought the case within the second class of privileged communications which I have noticed. To each of these pleas there were two replications (as authorized by the Revised Statutes upon a special application to the court), each of which replication was a good answer to the plea: one replication traversed the fact that the words spoken were either *pertinent* or *material* to the matter in question, and the other traversed the allegation in the plea that the words were used by the defendant in the matter in question before the justice, *while conducting his defence* therein; and as the jury found a verdict for the plaintiff on all the issues, neither of those pleas can aid the defendant. In the last special plea the defendant, in addition to the facts stated in the two preceding pleas, also averred that the words were spoken *without any malice* towards the plaintiff, and therefore, if I am right in supposing that a party is not answerable for words innocently spoken by him in conducting his defence in a judicial proceeding, and without malice, although they may not have been strictly pertinent, perhaps a replication *merely denying the pertinency* of the words would not have been a sufficient answer to this plea. The first replication to this plea does, however, in substance, put in issue the question of *malicious intent* as well as the *pertinency* of the slanderous words, although the malice is only stated by way of inducement to the traverse of the malicious intent. As that part of the replication directly nega-

tives the allegation in the plea which it was material to negative in connection with the traverse of the pertinency of the slanderous words, its effect, after verdict, must be different from the case of a replication which merely sets up new matter as inducement to the traverse, and then traverses an immaterial allegation in the plea, leaving that which was most material unanswered. It is in this case, at most, but a misjoining of the issue, which is cured after verdict; and the jury have found in terms, in reference to this issue, that the words were spoken *falsely* and *maliciously*, and that they were *not pertinent* and material. Again, the second replication to this plea is a full answer to it, even if the first replication is stricken entirely out of the record; and upon the last replication the jury have found that the slanderous words were not uttered by the defendant while conducting his own defence on the examination before the justice, as alleged in his last special plea.

For these reasons I think the Supreme Court were right in refusing to arrest the judgment, and that their decision should be affirmed.

The court being *unanimously* of the same opinion, the judgment of the Supreme Court was accordingly

Affirmed.

BROMAGE and Another v. PROSSER.

(4 Barn. & C. 247. King's Bench, England, Easter Term, 1825.)

Privilege. Honest Advice. In an action for words spoken of the plaintiffs in trade as bankers, it was proved that A. B. met the defendant and said, "I hear that you say that the plaintiff's bank at M. has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at C., and nobody would take their bills, and I came to town in consequence of it myself." It was proved that C. D. told the defendant that there was a run upon the plaintiff's bank at M. Upon this evidence the learned judge, after observing that the defendant did not appear to have been actuated by any ill-will against the plaintiffs, directed the jury to find their verdict for the defendant, if they thought the words were not maliciously spoken. *Held*, upon motion for a new trial, that although malice was the gist of the action for slander, there were two sorts of malice, — malice in fact and malice in law: the former denoting an act done from ill-will towards an individual; the latter a wrongful act intentionally done, without just cause or excuse; and that in ordinary actions for slander, malice in law was to be inferred from the publish-

ing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions for slander, *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved. *Held*, therefore, in this case, that the judge ought first to have left it as a question for the jury, whether the defendant understood A. B. as asking for information, and whether he had uttered the words merely by way of honest advice to A. B. to regulate his conduct; and, if they were of that opinion, then, secondly, whether in so doing he was guilty of any malice in fact.

THIS was an action for words spoken of the plaintiffs in their trade and business as bankers at Monmouth. The declaration stated that the plaintiffs carried on the trade and business of bankers in partnership, at Monmouth and Brecon, and had always conducted themselves with credit and punctuality towards their creditors and customers; and until the speaking of the words, &c., had never been suspected of being guilty of any act of insolvency, or of having stopped or made default in payment of the moneys due or owing from them in their said trade and business, but were in good credit and gaining profits; yet defendant, contriving, &c., spoke the following words: "The bank of Bromage & Snead (the plaintiffs) at Monmouth is stopped." The second count stated that, in a discourse which the defendant had with one L. Watkins, in the presence and hearing of other subjects of the realm, of and concerning the plaintiffs in the way of their trade and business, and of and concerning the said bank of the plaintiffs at Monmouth, he, the defendant, further contriving and intending as aforesaid, in the presence and hearing of the said L. Watkins and the said last-mentioned subjects, and in answer to a certain question and observation put and made by the said L. Watkins to the defendant, as to the said plaintiffs in their said trade and business, and as to the said defendant having said that the bank of the plaintiffs at Monmouth was stopped, falsely and maliciously spoke and published of and concerning the said plaintiffs, in the way of their aforesaid trade and business, and of and concerning the bank of the plaintiffs at Monmouth aforesaid, the words following: "Yes, it is. I was told so;" thereby meaning that the plaintiffs had stopped, and made default in the payment of the moneys due and owing from them in their said trade and business of bankers at Monmouth aforesaid. The third count stated that, in answer to a question and observation put and made by Watkins to the defendant, as to the plaintiffs in their trade and business, and as to their bank at Monmouth aforesaid being

stopped, defendant spoke the words, "Yes, it is." Plea, not guilty. At the trial before Park, J., at the summer assizes for Monmouth, 1824, it appeared that Watkins, on the 13th of January, 1824, met the defendant in Brecon, and, addressing him, said: "I hear that you say the bank of Bromage & Snead at Monmouth is stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at Crickhowell, and nobody would take their bills, and I came to town in consequence of it myself." Watkins then said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." It was proved on the part of the defendant that one George Brown, to whom the defendant had paid two one-pound notes issued by the plaintiffs, told the defendant, on the 12th of January, that there was a run upon the plaintiffs' bank; and that, if there was any thing in it, he must take the notes back; and that he, Brown, afterwards returned the notes to the defendant on that ground; but he never told the defendant that the bank had stopped, or that nobody would take their bills. The learned judge told the jury that malice was the gist of the action; that it did not appear from the evidence that the defendant was actuated by any ill-will against the plaintiffs, and that if the words were not spoken maliciously, the defendant was not answerable; that they ought, therefore, to find their verdict for the defendant, if they thought that the words were not spoken maliciously; otherwise, for the plaintiffs. The jury found a verdict for the defendant. A rule *nisi* for a new trial was obtained in last Michaelmas term, by Campbell, on the ground that the learned judge had improperly left to the jury the question of malice; for it was to be inferred in this case from the act of the defendant, inasmuch as the occasion did not justify the speaking of the words.

W. E. Taunton and *Maule* showed cause. The question of malice was properly left to the jury. In *Hewer v. Dawson*, Bull. N. P. 8, which was an action for saying of the plaintiff, a tradesman, "He cannot stand it long; he will be a bankrupt soon," it was proved by a witness that the words were not spoken maliciously, but by way of warning; and Pratt, C. J., directed the jury "that, though the words were otherwise actionable, yet if they should be of opinion that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not

guilty ;" and they did so accordingly. So in *Rogers v. Clifton*, 8 B. & P. 592, Lord Alvanley says : " I think I should grievously have invaded the province of a jury if I had not left it to say whether, considering all the circumstances of the case, the conduct of the defendant was not malicious." [BAYLEY, J. Under certain circumstances, words which would otherwise be actionable are *prima facie* excusable cases.] All those cases come within this rule, that the circumstances negative malice. The occasion may alter the burden of proof, but still the malice is a question for the jury. If malice is to be presumed, the presumption is to go to the jury as proof ; therefore, *quacunque via*, the question must be decided by them. It cannot be disputed that the evidence given by the defendant tended to negative malice. But even if that were doubtful, the plaintiff would not be entitled to a new trial. Upon the first count, it is clear that the verdict was properly found for the defendant, for there was no evidence to support it. The words there set out amount to a positive statement by the defendant that " the bank of Bromage & Snead, of Monmouth, has stopped ;" the evidence was, that in answer to questions whether defendant had said so, and whether it was true, the defendant said it was, and that he was told so, and that it was so reported at Crickhowell. Now, these words do not amount to a charge that the bank had stopped ; there is a material variance between the allegation and the proof. The second count is quite new in form ; and it alleges that, in answer to a question put by Watkins to defendant, as to the plaintiffs in their trade and business, and as to the defendant having said that the bank of the plaintiffs at Monmouth had stopped, the defendant spoke of and concerning the plaintiffs in the way of their trade and business, and of and concerning the bank of the plaintiffs at Monmouth, the words, " Yes, it is : I was told so." It is not averred that the answer had reference to the assertion that the bank had stopped. If a verdict had been found for the plaintiffs on that count, no judgment could have been given. The third count is equally objectionable. It is quite ambiguous whether the defendant meant to say that he had used certain words, or that those words were true. The record is therefore defective : *Garford v. Clerk*, 2 Cro. Eliz. 857 ; and on that ground the court will not grant a new trial. *Campbell and G. R. Cross*, contra. The words spoken by the defendant were in themselves clearly actionable, and the plaintiff

is entitled to a new trial, unless it is to be decided that in all cases of slander, without reference to the occasion or circumstances of uttering it, malice is a question for the jury. It has hitherto been understood that when slanderous words are spoken, without any privilege for the communication, the law infers malice from the probable result, viz., the injury to the defendant. The cases cited on the other side were instances of privileged communications, and totally different from the present. Suppose this defendant to have said that the plaintiffs stole a horse, it would be no answer to say that he had heard so, and believed it to be true; no question of malice could, under such circumstances, be left to the jury. A plea stating such facts would be clearly insufficient; the evidence must be likewise insufficient when given under the general issue. Now, in this respect, there is no difference between words imputing felony and insolvency. Even if the words had been spoken to the defendant under circumstances which justified them, yet a faithful repetition of them would not be justified unless the author were named. *Davis v. Lewis*, 7 T. R. 17. Here there was not a faithful repetition of what the defendant heard; he was told there was a run upon the bank, and he reported that it had stopped. Then, as to the sufficiency of the evidence, there certainly was evidence to support the first count. [LITLEDALE, J. In an action for words you cannot, out of a question and answer, make an affirmative proposition. You must state the question and answer.] Still the evidence may be taken as an admission by the defendant that he said so on a former day; and evidence of an admission of having spoken words is sufficient to support a declaration charging those words. To the second and third counts no objection was made at the trial, and the words were proved as laid. [BAYLEY, J. Does the question, "Is it true?" mean, "Is it true that you said so and so?" or, "Is it true that the bank has stopped?"] That being equivocal, was a question for the jury. If the defendant, by answering, "Yes, it is," meant that he had used the words, the second count was proved; if he meant that the bank had stopped, the third count was proved; and, in either case, the plaintiff was entitled to a verdict.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the court. This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was, that in answer to a question from

one Lewis Watkins, whether he, the defendant, had said that the plaintiffs' bank had stopped, the defendant's answer was, "It was true; he had been told so." The evidence was, that Watkins met defendant and said, "I hear that you say the bank of Bromage & Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes, it is; I was told so." He added, "It was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." Defendant had been told at Crickhowell there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but, as the defendant did not appear to be actuated by any ill-will against the plaintiffs, he told the jury that if they thought the words were not spoken maliciously, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken maliciously, they should find for the plaintiff. And the jury having found for the defendants, the question upon a motion for a new trial was upon the propriety of this direction. If in an ordinary case of slander (not a case of privileged communication) want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. That malice, in some sense, is the gist of the action, and that therefore the manner and occasion of speaking the words is admissible in evidence to show they were not spoken with malice, is said to have been agreed (either by all the judges, or at least by the four who thought the truth might be given in evidence on the general issue) in *Smith v. Richardson*, Willes, 24; and it is laid down, 1 Com. Dig. Action upon the Case for Defamation, G. 5, that the declaration must show a malicious intent in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action; but in

what sense the words "malice" or "malicious intent" are here to be understood, whether in the popular sense or in the sense the law puts upon those expressions, none of these authorities state. Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery, without knowing the owner, — I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. Russell on Crimes, 614, n. 1. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice — malice in fact and malice in law — in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. This is so laid down in Style, 392, and was adjudged upon error in *Mercer v. Sparks*, Owen, 51, Noy, 35. The objection there was, that the words were not charged to have been spoken maliciously; but the court answered that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander as is *prima facie* excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff; and in *Edmonson v. Stevenson*, Bull. N. P. 8, Lord Mansfield takes the distinction between these and ordinary actions of slander. In *Weatherston v. Hawkins*, 1 Term Rep. 110, where a master who had given a servant a character, which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded

him, Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels, that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is sufficient to prove publication; the motives of the party publishing are never gone into, and that the same doctrines held in actions for words, no express malice need be proved. Lord Mansfield said the general rules are laid down as Mr. Wood has stated, but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's showing it to be false and malicious, it appears to be incidental to the application by the intended master for the character; and Buller, J., said this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "malicious" as well as "false." Buller, J., repeats, in *Pasley v. Freeman*, 3 T. R. 61, that for words spoken confidentially upon advice asked no action lies, unless express malice can be proved. So in *Hargrave v. Le Breton*, 3 Burr. 2425, Lord Mansfield states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel, or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had heard before, but without naming the author) upon which, if that were a tenable ground, evidence would have been sought for and obtained; and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question whether the defendant understood Watkins as asking for information for his own guidance, and that the defendant spoke what he did to Watkins merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a second question to the jury, if their minds were in favor of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are

of opinion that the question of malice ought not to have been left to the jury. It was, however, pressed upon us with considerable force that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration ; but, upon carefully attending to the declaration and the evidence, we think we are not warranted in saying that there was no evidence to go to the jury to support the declaration ; and, had the learned judge intimated an opinion that there was no evidence, the plaintiff might have attempted to support the defect. We therefore think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say that it may not be proper to put the question of malice as a question of fact for the consideration of the jury ; for if the jury should think that when Watkins asked his question the defendant understood it as asked in order to obtain information, to regulate his own conduct, it will range under the cases of privileged communications, and the question of malice in fact will be a necessary part of the jury's inquiry ; but it does not appear that it was left to the jury in this case to consider whether this was understood by the defendant as an application to him for advice, and if not, the question of malice was improperly left to their consideration. We are, therefore, of opinion that the rule for a new trial must be absolute.

Rule absolute.

TOOGOOD v. SPYRING.

(1 Crompt., M. & R. 181. Exchequer, England, Trinity Term, 1834.)

Privilege. Master and Servant. A., the tenant of a farm, required some repairs to be done at the farm-house, and B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, and during the progress of it got drunk, and some circumstances occurred which induced A. to believe that C. had broken open his cellar-door and obtained access to his cider. A., two days afterwards, met C., in the presence of D., and charged him with having broken his cellar-door, and with having got drunk and spoiled the work. A. afterwards told D., in the absence of C., that he was confident C. had broken open the door. On the same day, A. complained to B. that C. had been negligent in his work, had got drunk, and he thought he had broken open his cellar-door. *Held*, that the complaint to B. was a privileged communication, if made *bona fide*, and without any

malicious intention to injure C. *Held*, also, that the statement made to C., in the presence of D., was also privileged, if made honestly and *bona fide*; and that the circumstance of its being made in the presence of a third person does not of itself make it unauthorized, and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether A. acted *bona fide*, or was influenced by malicious motives. *Held*, also, that the statement to D., in the absence of C., was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false.

SLANDER. The first count of the declaration stated that the plaintiff, at the time of committing the grievance thereafter mentioned, was a journeyman carpenter, and accustomed to employ himself as a journeyman carpenter, and gain his living by that employment, and had been, and was at the time of committing the grievance, &c., retained and employed by, and in the service of, one James Brinsdon, as his journeyman carpenter and workman, at and for certain wages and rewards by the said James Brinsdon to him paid in that behalf; and in that capacity and character had always behaved and conducted himself with honesty, sobriety, and great industry and decorum, and never was, nor, until the time of committing the grievances, was suspected to have been, or to be, dishonest, drunken, dissolute, vicious, or lazy, to wit, in the county aforesaid; by means of which said several premises he had not only acquired the good opinion of his neighbors and divers other good and worthy subjects, &c., and especially the high esteem of his masters and employers, but had also derived and acquired for himself divers great gains, &c. That the plaintiff, at the time of committing the grievances in the first, second, and last counts mentioned, had been employed by the said James Brinsdon, as his workman and journeyman, in and upon certain work, to wit, on and about certain premises of the defendant, and there, upon and throughout that occasion, and during the whole of his, the plaintiff's, work in and about the same, had behaved and conducted himself with honesty, sobriety, and great industry and decorum, and in a proper and workmanlike manner, yet the defendant, well knowing, &c., but contriving, &c., and to cause it to be suspected and believed that the plaintiff had been and was guilty of the offences and misconduct thereafter stated to have been charged upon and imputed to him by the defendant, theretofore, to wit, on the 9th of January, 1834, in the county aforesaid, in

a certain discourse which the defendant then and there had with the plaintiff, of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, in the presence and hearing of divers worthy subjects, &c. ; then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published to and of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, the false, scandalous, malicious, and defamatory words following, that is to say : —

“What a d—d pretty piece of work you (meaning the plaintiff) did at my house the other day.” And in answer to the following question, then and there, in the presence and hearing of the said last-mentioned subjects, put by the plaintiff to the defendant, that is to say, “What, sir?” then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke, and addressed to and published of and concerning the plaintiff, and of and concerning him in relation and with reference to the aforesaid work, these other false, scandalous, malicious, and defamatory words following, that is to say, “You broke open my cellar-door, and got drunk, and spoiled the job you were about” (meaning the aforesaid work).

The words, as stated in the second count, were, “He broke open my cellar-door, and got drunk, and spoiled the job he was about.”

In the third, that in answer to an assertion of the plaintiff that he had never broken into or entered the defendant's cellar, the defendant said, “What! I will swear it, and so will my three men.”

The fourth count stated, that on, &c., in a certain other discourse which the defendant then and there had with a certain other person, to wit, one Richard Taylor, of and concerning the plaintiff, in the presence and hearing of the said last-mentioned person, and of divers other good and worthy subjects, &c., and in answer to a certain question whereby the last-mentioned person, to wit, the said Richard Taylor, did then and there, in the presence and hearing of the other last-mentioned subjects, interrogate and ask of the defendant whether he, the defendant, meant to say that the plaintiff had broken into the cellar of the

defendant, he, the defendant, then and there, in the presence and hearing of the last-mentioned subjects, falsely and maliciously answered, spoke, and published to the last-mentioned person, to wit, the said Richard Taylor, in his presence and hearing, these other false, scandalous, malicious, and defamatory words following, of and concerning the plaintiff, that is to say, "I (meaning the defendant) am sure he (meaning the plaintiff) did (meaning that the plaintiff had broken into his, the defendant's, cellar), and my (meaning the defendant's) people will swear it."

The words in the fifth count were alleged to be spoken generally, as in the first three, and not to any particular individual; and they were these: "You got drunk and spoiled the job you were about" (meaning the aforesaid work). The declaration then alleged that, by reason of the committing of the grievances, he, the plaintiff, was greatly injured in his good fame, character, occupation, and credit, and brought into public scandal, &c., insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, him to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the defendant; and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the plaintiff, as they were before used and accustomed to have, and otherwise would have had; and also by means of the premises the said James Brinsdon, who before and at the time of the committing of the said grievances had retained and employed, and otherwise would have continued to retain and employ, the plaintiff as his journeyman workman and servant for certain wages and reward, to be therefor paid to the plaintiff, afterwards, to wit, on the day and year aforesaid, in the county aforesaid, discharged the plaintiff from his service and employ, wholly refused to retain and employ the plaintiff in his said service and employ; and the plaintiff hath from thence hitherto wholly, by means of the premises, and from no other cause whatever, remained and continued and still is out of employ, &c.

The defendant pleaded, first, the general issue; secondly, that

before the committing of the grievance, to wit, on the 7th January, 1834, the said plaintiff broke open a door of a cellar of the said defendant, in a house of the said defendant, and then and there broke into the said cellar, and got drunk, and spoiled the said work in the introductory part of the said declaration mentioned; wherefore he the said defendant did speak and publish the said words, as in the said declaration respectively mentioned, of and concerning and relating to the said house and the said cellar-door, as he lawfully might for the cause aforesaid. And this, &c. Thirdly, as to the first, second, and last counts, and as to the speaking and publishing of the following words, that is to say, "I am sure he (meaning the plaintiff) did" (meaning that the said plaintiff had broken into his, the defendant's, cellar), as in the said fourth count of the declaration mentioned, that before &c., to wit, on the 7th of January, 1834, the said plaintiff broke open the door of a cellar of the said defendant, in a house of the said defendant, and got drunk, and spoiled the said work in the introductory part of the said declaration mentioned; therefore, the said defendant did commit the supposed grievances in the introductory part of that plea mentioned, as he lawfully might for the cause aforesaid. And this, &c.

Replication, *de injuria* to the second and last plea.

At the trial before Bosanquet, J., at the last spring assizes for the county of Devon, it appeared that the plaintiff was a journeyman carpenter, and had been in the employ of Brinsdon, a master carpenter, in the constant employ of the Earl of Devon, at Powderham Castle; that the defendant resided on a farm under the Earl of Devon; that the defendant required some repairs at his farm; and that, pursuant to the order of Mr. Brinsdon, the plaintiff and another workman went to the defendant's residence on the 7th of January, for the purpose of erecting a new door to the defendant's tool-house (which adjoined the cellar), and doing other repairs to the house and premises of the defendant. It was proved that the work was done in a negligent manner, and not to Brinsdon's satisfaction, the door being cut so small as not to answer the purpose for which it was intended; that, during the progress of the work, the plaintiff got drunk, and circumstances occurred which induced the defendant to believe that the plaintiff had broken open the cellar-door, and obtained access to his cider. Brinsdon had requested the defendant to inspect the

work. It was proved that the plaintiff and one Taylor were at work, on the 9th of January, at Powderham Castle, and that the defendant came up, and, addressing himself to the plaintiff, spoke in his presence the following words: "What a d—d pretty piece of work you did at my house the other day;" that the plaintiff said: "What, sir?" and that the defendant replied, "You broke open my cellar-door, and got drunk and spoiled the job you were about;" that the plaintiff denied the charge, but that the defendant said he would swear it, and so would his three men. It was also proved that, in a subsequent conversation, when the plaintiff was not present, the defendant, in answer to a question put to him by Taylor, whether he really thought the plaintiff had broken the cellar-door, said: "I am sure he did it, and my people will swear to it." The defendant then went away in search of Mr. Brinsdon. It was proved that the defendant afterwards saw Brinsdon on the same day, the 9th of January, and that he said to him that Toogood had spoiled the door, and that the cellar had been broken open, and that Toogood had got drunk; he said it had been done with a chisel, and that Toogood did it, because of the getting drunk. It appeared that Brinsdon went afterwards to the plaintiff, and told him that he could be no longer in the employ of the Earl of Devon, until this was cleared up; that he must come to the defendant's, with the other workman, the following morning, to have the matter investigated; that he, Brinsdon, went to the defendant's the following morning, and that the plaintiff and defendant were there, and that he examined the cellar-door, but doubted whether it had been broken open at all, though the bolt was broken; and Brinsdon told the plaintiff he considered the charge against him was not made out, and that he thought his character was cleared up, and that he might go to work again if he thought proper; but the plaintiff said his character was not cleared up; and he did not go to his work afterwards.

The learned judge, in summing up the case to the jury, said that he should have thought that the defendant would have been justified if he had made the complaint to Mr. Brinsdon in the first instance; but that he had spoken the words in the presence of a third person, and that the speaking was not in the nature of a complaint to the plaintiff's employer; that it appeared to him that the act of making the imputation to the plaintiff in the pres-

ence of another person gave the plaintiff a right to maintain the action; that the plaintiff, also, was not justified in making the subsequent charge to Taylor, in the absence of the plaintiff, that he had broken open the cellar-door. The jury having found a verdict for the plaintiff, with 40s. damages, *Follett*, in Easter term last, obtained a rule to show cause why a nonsuit should not be entered, or a new trial had, on the grounds, first, that the circumstances under which the words were spoken constituted it a privileged communication; and, secondly, on the ground of misdirection on the part of the learned judge.

Praed showed cause. There are two questions here: first, it is said that the words in question were spoken under circumstances which made it a privileged communication; and, secondly, that the case was improperly summed up to the jury. With regard to the first point, it is submitted that this went beyond the nature of a privileged communication. Even if the defendant would have been justified in stating what he did to Brinsdon, he could not justify speaking the words to the plaintiff in the presence of a third person. The defendant does not even say that he comes to complain to Brinsdon. In *Macdougall v. Claridge*, 1 Camp. 267, Lord Ellenborough, in speaking of a communication as privileged, where it is made by one party interested to another having an interest in the same matter, complaining of the conduct of a person whom they had employed to manage their concerns, expressly puts it on the ground of the communication not being meant to go beyond those immediately interested in it. [ALDERSON, B. Here the damages were taken generally. Now, who can say what damages the jury gave for what was said to Brinsdon? and what damages they gave for what was spoken before Taylor?] If the defendant had a right to complain that the work was improperly done, he had no right to charge the plaintiff with breaking open the cellar-door and getting drunk, as that amounts to a charge of felony. It may be said that there is no allegation in the declaration meant to impute felony to the plaintiff. That, however, is immaterial, as there is an allegation and proof of special damage. In *Moore v. Meagher*, 1 Taunt. 39, it was held, that if, in consequence of words spoken, the plaintiff is deprived of substantial benefit arising from the hospitality of friends, that is a sufficient temporal damage whereon to maintain an action. [PARKE, B. Here there was no special damage

proved.] It is submitted that there was evidence to go to the jury, as it was proved that Brinsdon would not employ the plaintiff until his character was cleared; and though he told him afterwards that he might go to his work again, the plaintiff did not do so, because his character was not clear. [PARKE, B. To make out special damage in this case, you should have shown that the plaintiff was removed from a beneficial employment, which you have not done. The jury did not find special damage; they gave general damages.] Secondly, it is submitted that the case was properly left to the jury, as the circumstances under which the words were spoken showed a malicious intention to injure the plaintiff. In *Dunman v. Bigg*, 1 Campb. 269, Lord Ellenborough said: "It will be for the jury to say whether these expressions were used with a malicious intention of degrading the plaintiff, or with good faith to communicate facts to the surety which he was interested to know." Now, here the words were not spoken to the party alone, but before another person; and, as it was not necessary that the defendant should speak the words in Taylor's presence, or say what he did to Taylor, his doing so, unnecessarily and officiously, is a circumstance from which malice may be inferred. Here the defendant was betrayed into a passion, and has gone beyond what he was justified in saying. In *Rogers v. Clifton*, 3 B. & P. 587, it was held that, although a master is not in general bound to prove the truth of a character given by him to a person applying to him for the character of his servant, yet, if he officiously state any misconduct, even of a trivial nature, which he is not able to prove, the jury might, from these facts, infer malice. It depends much on the manner in which the words are spoken whether they are to be deemed malicious or not. If I go to a tradesman, and, in a spiteful and revengeful manner, before his other customers, say that he has spoiled my coat, or sent me a bad joint of meat, that is conduct from which malice may be inferred. Besides, the plaintiff was not in the employ of the defendant, but in the employ of Brinsdon, and therefore the defendant had no right to complain of him. Here the defendant has, at all events, gone beyond the limits of a confidential communication, in charging the plaintiff with breaking the cellar-door and getting drunk. In *Godson v. Home*, 1 Brod. & B. 7, Richardson, J., says: "If a man giving advice calls another a thief, surely it is not necessary to leave it to the jury

whether such language is a privileged communication or not." Here, although the word "thief" is not used, the defendant said what is equivalent to it. It is quite clear the defendant meant more than to complain of the work being spoiled. If a man say to his tailor, in the presence of customers, "You sent me a bad coat," though he might be justified in speaking those words, he cannot be justified in saying, "You sent me a bad coat, and stole five of my books."

Follett, contra. In this case no special damage was proved, as the plaintiff was not dismissed by Brinsdon. When Brinsdon found that the door had not been broken open, he directed the plaintiff to go to his work again, but he did not do so; and, therefore, if he suffered any damage, it was his own fault. The words spoken to Taylor were not spoken in the way of his trade. [PARKE, B. Might not the words be spoken of him in his character of a journeyman carpenter? They might be spoken of him as having committed felony in the course of his trade. It might be that he availed himself of his situation to commit the felony.] It is submitted that such a general proposition cannot be laid down. Here it was no part of the business of the carpenter to break open the cellar-door. It is an act totally unconnected with his business as a carpenter, and those words are not spoken of him in the character of a carpenter. Words to be spoken of a man in his trade must relate to something done by him in the course of his particular calling. Besides, if the plaintiff had meant to say that the defendant had imputed felony to him, he should have alleged it in his declaration; there is, however, no such allegation or innuendo in this declaration. Suppose the words had been, "he had cheated his fellow-workmen," would they be actionable? It is submitted that they would not, inasmuch as they would have no relation to the plaintiff's trade. [ALDERSON, B. "You are an idle, dissolute workman, and when employed by me you robbed me:" are not these words actionable?] At all events, it was a question for the jury whether these words were spoken of the plaintiff in his trade, and that question was not left to them; therefore the defendant is entitled to a new trial. Then the learned judge said that the defendant had no right to make the complaint in the presence of a third person; but surely a master has a right to complain of his servant in the presence of a third person, if it is done *bona*

fide. If that were not so, in every case where the master complains of his servant in the presence of a third person, the servant would have a right of action against the master. Can it be said that a person who complains to a tradesman has no right to say in the presence of a third person that the work is badly done, when the complaint is made *bona fide*? [ALDERSON, B. You say that it is only evidence, more or less, of malice; but there is a communication to Taylor alone, which is not justified.] The complaint to Brinsdon was, at all events, justifiable. The court cannot know what damages the jury gave for those words, and what for the others, as the damages are general. If the complaint is made under circumstances that induce the party to believe in the truth of it, and he makes the complaint to the other party *bona fide*, it is privileged. All the cases where it has been held that the communications were not justifiable, were made to a third party, and not to the party himself. [ALDERSON, B. There are many cases in which words spoken in the presence of a third party have been held actionable, where the transaction was gone by, so that the party complained of was not able to right himself.] Here, the complaint was made at the time. It is submitted that the learned judge ought to have nonsuited. [ALDERSON, B. Surely it was a question for the jury.] It is only where there is some evidence to show that the defendant is not acting *bona fide* that it becomes a question for the jury. But where a party *bona fide* complains that work is badly done, it is a question of law whether it is a privileged communication or not. *Cur. adv. vult.*

On a subsequent day, the judgment of the court was delivered by

PARKE, B. In this case, which was argued before my brothers Bolland, Alderson, Gurney, and myself, a motion was made for a nonsuit, or a new trial, on the ground of misdirection. It was an action of slander, for words alleged to be spoken of the plaintiff as a journeyman carpenter, on three different occasions. It appeared that the defendant, who was a tenant of the Earl of Devon, required some work to be done on the premises occupied by him under the earl, and the plaintiff, who was generally employed by Brinsdon, the earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner; and, during the progress of the work, got drunk; and some

circumstances occurred which induced the plaintiff to believe that he had broken open the cellar-door, and so obtained access to his cider. The defendant, a day or two afterwards, met the plaintiff in the presence of a person named Taylor, and charged him with having broken open his cellar-door with a chisel, and also with having got drunk. The plaintiff denied the charges. The defendant then said he would have it cleared up, and went to look for Brinsdon; he afterwards returned and spoke to Taylor, in the absence of the plaintiff; and, in answer to a question of Taylor's, said he was confident that the plaintiff had broken open the door. On the same day the defendant saw Brinsdon, and complained to him that the plaintiff had been negligent in his work, had got drunk, and he thought he had broken open the door, and requested him to go with him in order to examine it. Upon the trial it was objected that these were what are usually termed "privileged communications." The learned judge thought that the statement to Brinsdon might be so, but not the charge made in the presence of Taylor; and in respect of that charge, and of what was afterwards said to Taylor, both which statements formed the subject of the action, the plaintiff had a verdict. We agree in his opinion, that the communication to Brinsdon was protected, and that the statement, upon the second meeting to Taylor, in the plaintiff's absence, was not; but we think, upon consideration, that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged; that is, cases where the occasion of the publication affords a defence in the absence of express malice. In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and

the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred ; but one of the most ordinary and common instances in which the principle has been applied in practice is, that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed, *Child v. Affleck*, 4 Man. & Ryl. 590 ; 9 B. & C. 403), the simple fact that there has been some casual by-stander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bona fide* to charge his servants for any supposed misconduct in his service, and to give him admonition and blame ; and we think that the simple circumstance of the master exercising that right in the presence of another does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose ; but the mere fact of a third person being present does not render the communications absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bona fide* in making the charge, or been influenced by malicious motives. In the present case the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment ; and we think that the fact that the

imputation was made in Taylor's presence does not, of itself, render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury. We agree with the learned judge, that the statement to Taylor, in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false; but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned judge was wrong in his opinion as to the statement to the plaintiff in Taylor's presence; and, as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion, there must be a new trial. *Rule absolute for a new trial.*

SIR W. DE CRESPIGNY v. WELLESLEY.

(5 Bing. 392. Common Pleas, England, Hilary Term, 1829.)

Privilege. Repeating Libel. In an action for a libel, it is no plea that the defendant had the libellous statement from another, and, upon publication, disclosed the author's name.

To the ninth count of a declaration for libel, the defendant, after pleading the general issue, pleaded, secondly, as to the publishing, and causing and procuring to be published, the following parts of the said supposed libel of and concerning the said plaintiff, in the said ninth count of the said declaration mentioned, with the intent and meaning therein mentioned; to wit, "Mr. De Crespigny told Mr. Wellesley, he was wrong in supposing he had spoken to his father, Sir W. De Crespigny (meaning the said plaintiff); he had written a letter to him, and he had his (meaning the said plaintiff's) answer, in which he admitted the fact; and that his wife, Mrs. De Crespigny, and himself had the letter; that all the family knew of the circumstance (intimacy) that his poor brother William, who is dead, was extremely jealous of his father (meaning the said plaintiff), and had been

turned out of his house ; that his mother had told him that a child had been born, and that it had been her conclusion that his brother Herbert had spoken to his father (meaning to the said plaintiff) upon the subject, who replied that he (meaning the said plaintiff) entreated that so distressing a subject might not be again mentioned to him (meaning to the said plaintiff) ; the Rev. Mr. De Crespigny told Mr. Wellesley he thought he was quite right not to allow his children to remain with people so infamously connected. Mr. De Crespigny informed Mr. Wellesley he had seen the Miss Longs yesterday at their house in Berkshire, and that he had directly accused Miss Emma Long with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment ; that he then stated to Miss Dora Long that Miss Emma Long had intrigued with his father (meaning with the said plaintiff), and that Mr. Wellesley (meaning the said defendant) intended to publish the whole story, unless they immediately gave up his children. Miss Long replied, that she had nothing to do with her sister's intrigue, and she must be responsible for her own conduct ; but that no one would believe what Mr. Wellesley said. Mr. De Crespigny assured Mr. Wellesley that she never denied her sister's having committed the fault. Mr. De Crespigny told her his father had confessed it (not denied it) ; to which she made no reply, but put herself into a violent passion, and said she did not wish to see any of Mr. Wellesley's friends within her house ; notwithstanding such declaration, she invited Mr. De Crespigny to dine with them, and to sleep at Binfield House ; the above minutes were shown to Captain De Brooke, and on the part of the Rev. H. C. De Crespigny he admitted them twice to be correct, with the exception of one word, viz., that for *confessed it* the words *not denied it* ought to be substituted." The said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have and maintain his aforesaid action thereof against him, because he says that before the publishing of the said parts of the said supposed libel in the said ninth count of the said declaration mentioned, to wit, on the 5th day of December, in the year of our Lord 1827, at, &c., the said Rev. H. C. De Crespigny told the said defendant that he was wrong in supposing that he, the said H. C. De Cres-

pigny, had spoken to his father, Sir W. De Crespigny; he had written a letter to him, and that he had his (meaning the said plaintiff's) answer, in which he (meaning the said plaintiff) admitted the fact; and that his (the said H. C. De Crespigny's) wife and himself had the letter; that all the family knew of the intimacy; that his poor brother William, who was dead, was extremely jealous of his father (meaning the said plaintiff), and had been turned out of his house; that his brother Herbert had spoken to his father (meaning the said plaintiff) upon the subject, who had replied that he (meaning the said plaintiff) entreated that so distressing a subject might not be again mentioned to him (meaning to the said plaintiff); and the said H. C. De Crespigny then and there further told the said defendant he thought he was quite right not to allow his children to remain with people so infamously connected. And the said H. C. De Crespigny afterwards, and before publishing the said libel in the introductory part of this plea mentioned, to wit, on, &c., at, &c., further told the said defendant that he had seen the Misses Long yesterday at their house in Berkshire, and that he, the said H. C. De Crespigny, had directly accused Miss Emma Long with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment; that he then stated to Miss Dora Long that Miss Emma Long had intrigued with his father (meaning the said plaintiff), and that Mr. Wellesley (meaning the said defendant) intended to publish the whole story unless they immediately gave up his children. That Miss Long replied, she had nothing to do with her sister's intrigue, and that she must be responsible for her own conduct, but that no one would believe what Mr. Wellesley said; and the said H. C. De Crespigny assured the said defendant that she never denied her sister's having committed the fault. Mr. De Crespigny told her his father had not denied it; to which she made no reply, and said she did not wish to see any of Mr. Wellesley's friends within her house; notwithstanding such declaration she invited Mr. De Crespigny to dine with them, and to sleep at Binfield House. And the said defendant further said, that before the publishing the said parts of the said supposed libel in the introductory part of this plea mentioned, to wit, on, &c., at, &c., certain minutes and statements in writing were made as and for correct minutes and statements of the said communica-

tions and representations so made by the said H. C. De Crespigny as aforesaid, and the same were then and there revised and corrected by the said H. C. De Crespigny; and when so revised and corrected contained, and still do contain, the words and matter following, with the interlineations and alterations as follows. (Here followed a statement of the minutes as revised and corrected by the Rev. H. C. De Crespigny. The expression *not denied*, was substituted for *confessed*; and the statement, that his mother told him a child had been born, was erased; in other respects the minutes corresponded with the foregoing statements.)

And the said defendant further said, that afterwards, and before the publishing of the said parts of the said supposed libel, in the said ninth count mentioned, to wit, on, &c., at, &c., the said H. C. De Crespigny caused the said minutes and statements, so revised and corrected by him as aforesaid, and containing the words and matter last aforesaid, to be delivered to him, the said defendant, as and for a true and correct statement of the conversation he, the said H. C. De Crespigny, had had with the said defendant as aforesaid; and the said minutes were theretofore, to wit, on, &c., at, &c., shown to the said Captain De Brooke, in the presence of the said Colonel Freemantle, Mr. Saville Lumley, M.P., and Colonel Paterson. And the said defendant further said, that, at the time of the publishing the said parts of the said supposed libel in the said ninth count, and in the introductory part of this plea mentioned, as therein mentioned, he, the said defendant, also published that the same had been so published to him by the said H. C. De Crespigny, therein mentioned as aforesaid; wherefore he, the said defendant, at the said several times, when, &c., in the said ninth count mentioned, did publish of and concerning the said plaintiff the said several parts of the said supposed libel in that count mentioned, as he lawfully might for the cause aforesaid, and this he is ready to verify, &c.

To this plea there was a demurrer; many causes of demurrer were specified and argued; but as the decision turned altogether on the general question, it is unnecessary to state the other points.

Wilde, Serjt., in support of the demurrer. *Spankie*, Serjt., contra.

BEST, C. J. Great industry has been bestowed upon this case

by my learned brothers by whom it was argued, but no case has been cited in which the principle, extrajudicially applied by the fourth resolution in Lord Northampton's case to oral slander, has been extended to libel. We might relieve ourselves from the difficulty of deciding this question by saying that the technical objections taken to the pleas by the demurrer are sufficient to entitle the plaintiff to judgment. But we think it more proper for us to pronounce our judgment on the principal question raised by these pleadings, namely, whether a man who receives from the hands of another a libel on any person is justified in publishing that libel, provided that in his publication the name of the person from whom he received it is mentioned? We do not hesitate to say, that even if we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man at the time of his speaking the words names the person who told him what he relates, he may plead to an action brought against him that the person whom he names did tell him what he related, such a justification cannot be pleaded to an action for the republication of the libel.

If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and, if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove.

The reason which Lord Coke gives, why in the case of oral slander you should name the author, proves that you must not be allowed to publish written calumny; he says that, unless you mention the name of the author, it might be a great slander of an innocent; "for if one who has *læsam phantasiam*, or is a

drunkard, or of no estimation, speaks scandalous words, if it shall be lawful for a man of credit to report generally that he had heard scandalous words without mentioning his author, that would give greater color and probability that the words were true in respect of the credit of the reporter than if the author were mentioned; for the reputation of every good man is dear and precious to him." Of what use is it to send the name of the author with a libel that is to pass into a country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind, or the delusion of a lunatic. There is no allegation in this case that the defendant believed this statement; on the contrary, it is to be observed that Mr. De Crespigny struck out a very material part of the statement, and yet the defendant published it, although he must have known that it was not correct. I allude to that part in which the defendant makes Mr. De Crespigny say that his mother had told him that a child had been born. Although he tells you in his plea that De Crespigny had erased those words, yet he justifies the publishing of them. The declarations of a son and dying wife are made the means of blasting the character of a father and husband. If, without any allegation that its contents were true, or that the publisher had any reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the characters of any persons they might be disposed to calumniate; there will be no difficulty in getting wretches, who would be better off within the walls of a prison than they are without, to furnish such as will pay for them with any statements they may desire respecting the character of any person whatsoever.

Written communications are often made for the information of those to whom they are given, and for their information only. Such communications contain facts necessary to be known by those to whom they are made, but not fit to be divulged to the whole world. It may be important to the interest of the members of a family to know of things which have taken place in their family, and which having been disclosed with a due regard

to the interest of the person to whom the disclosure was made, although injurious to some other person's character, would not be libellous. Can it be permitted that persons possessing such communications should publish them to the world, if they only give the names of those by whom they were made? Such a doctrine might furnish amusement for the lovers of scandal, but it would cause much misery in many families. It is a principle of our law that whoever wilfully assists in the doing an unlawful act becomes answerable for all the consequences of such act. What reason is there to except the circulation of slander out of this rule? He who prints and publishes what was given to him in manuscript has to answer for by far the greatest part of the mischief that the statement has occasioned. But it has been said at the bar that these pleas are *prima facie* answers, and that the circumstances that are to show that the publication was not honestly made are to come from the plaintiff in his replication, or to be proved under the general replication *de injuria*. The defendant ought to know the state of the author, and the circumstances in which he wrote the libel. The plaintiff may be ignorant of those circumstances. The law requires that facts should be proved by those who ought to have the means of knowing them, and not by those who must be presumed ignorant of them. But these pleas do not present a *prima facie* defence. They offer nothing which requires an answer. Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong. If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. This seems to be a case of the latter description; but, if published either with or without the authority of the writer, it can never be a justification, nor can the previous publication be set up in mitigation of damages, without proof that the author believed it true, and had some reasonable cause for publishing it. We are not to endure a reproach against our neighbor. What, then, is our moral duty, if we hear any thing injurious to the

character of another? If what we have been told does not concern the public or the administration of justice, we are to lock it up for ever in our own breasts. We are on no account to report it to gratify our enmity to any particular person, or, for that more common cause of slander, to gratify the malice that exists by a desire to raise ourselves above, or to keep ourselves upon, an equality with our neighbors by injuring their characters.

The statements published relative to the plaintiff do not concern the public; they are **not disclosed** in the course of the administration of justice; nor does it appear from the pleadings that the defendant, in making this virulent attack on the **plaintiff**, has the excuse that he published this paper in his own defence; but before he used this statement in any manner, he was bound to satisfy himself that it was true; and he does not even say that he believed it. Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter. We are warranted in saying that the defendant has made a very serious charge against the character of the plaintiff, without being prepared to make it good; for if he could have proved that what he published was true, he might have put the truth of the statement on the record as his justification.

Judgment for the plaintiff.

Malice in Fact. Privileged Communications. (a.) Absolute Privilege.—The existence of an absolute privilege from liability for defamatory words has been denied; and it becomes important to examine the cases upon this point. In *White v. Nicholls*, 3 How. 266, the defendants were sued for a libel contained in a memorial to the President of the United States, praying the removal of the plaintiff from the office of collector

of customs. The plaintiff offered to prove express malice in the court below, and was refused. This was held to be error by the Supreme Court of the United States. The case clearly belonged to the class of *prima facie* privileged communication, as the libel was not published in a judicial or legislative cause; and there can be no doubt, therefore, of the correctness of the decision made. The court, however, pro-

ceeded to consider the case of language used in the courts of justice and in the legislature, and reached the conclusion that there were no absolutely privileged communications. "The description," say the court, "of cases recognized as privileged communications must be understood . . . as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it from that just implication from which the general rule of law is deduced. The rule of evidence as to such cases is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanction the indulgence of malice, however wicked, however express, under the protection of legal forms."

Dicta of Mr. Justice Holroyd and of Mr. Justice Abbott in *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, were cited in support of this position. The former remarked that if the words were fair comments upon the evidence, and were relevant to the matter in issue, then, unless express malice were shown, the occasion justified them. "If, however," said he, "it be proved that they were not spoken *bona fide*, or express malice be shown, then they may be actionable; at least our judgment in the present case does not decide that they would not be so." The language of the learned judge thus appears to be to the effect that the question of express malice was not involved in the case,

and leaves it open for future consideration.

The language of Mr. Justice Abbott was to the effect that the action could not be maintained unless it were shown that the counsel maliciously availed himself of his situation to utter words wholly unjustifiable. "Here," said he, "the words were pertinent, and there is no pretence for saying that the defendant maliciously availed himself of his situation to utter them."

These remarks do not give much support to the position of the court in *White v. Nicholls*. They appear to have been made from extreme caution lest the decision should seem to cover ground not intended, at least by those two judges. That Mr. Justice Holroyd's *dictum* cannot be taken farther than this appears from what he says in the subsequent case of *Flint v. Pike*, 4 Barn. & C. 473, 481. "In the course of the administration of justice," he observes, "counsel have a special privilege of uttering matter even injurious to an individual, on the ground that such a privilege tends to the better administration of justice. And if a counsel in the course of a cause utter observations injurious to individuals, and not relevant to the matter in issue [*quære*, if this is not going too far. *Hastings v. Lusk*], it seems to me that he would not, therefore, be responsible to the party injured in a common action for slander, but that it would be necessary to sue him in a special action on the case, in which it must be alleged in the declaration and proved at the trial that the matter was spoken maliciously, and without reasonable and probable cause." And, showing that this observation is made deliberately, he adds: "This may be illustrated by the common case of a false charge of felony

exhibited before a justice of the peace; there an action upon the case, as for defamation, will not lie, because the slander is uttered in the course of the administration of justice; but the party complaining is bound to allege that it was made without reasonable or probable cause." See *Johnstone v. Sutton*, 1 T. R. 544, 545.

The court in *White v. Nicholls* further refer to *Curry v. Walter*, 1 Bos. & P. 525, where it is held that a true report of what passed in a court of justice is not actionable; and say that this doctrine has been modified by later cases. *Rex v. Creevey*, 1 Maule & S. 273; *Rex v. Carlile*, 3 Barn. & Ald. 167; *Delegal v. Highley*, 3 Bing. N. C. 950; *Fairman v. Ives*, 5 Barn. & Ald. 642. But the doctrine of *Curry v. Walter* has more recently been considered, and has been confirmed. *Hoare v. Silverlock*, 9 Com. B. 20. This was an action for an alleged libel, which consisted of a report of a trial of a case between the plaintiff and another. On the part of the defendant (who pleaded *not guilty*), it was proposed to prove that the report in question was a fair and substantially correct report. This the plaintiff contended was not admissible, at all events under the general issue. The evidence, however, was admitted; and the jury were instructed that if they were satisfied that the publication was no more than a fair and impartial report of the trial, they must find for the defendant. On a motion for a new trial, the plaintiff contended that the defence should have been specially pleaded, so that he could meet it; but the motion was denied, and the instruction sustained by the full court.

The effect of the decision, therefore, was that the defence was a complete one, and not merely *prima facie*. See

also *Ryalls v. Leader*, Law R. 1 Ex. 296, where Pollock, C. B., said that where the report of a trial was fair there was no foundation for an action for libel.

It was conceded in *White v. Nicholls* that *Lake v. King*, 1 Saund. 131 b, was opposed to the view maintained. It was there held that the printing of a false and scandalous petition to a committee of the House of Commons, and delivering copies of the same to the members of the committee, was justifiable, because it was published in the order and course of proceedings in Parliament. It was, indeed, agreed that no action lay for exhibiting the petition to a committee of Parliament, however false and scandalous it was; and the only question was, whether the manner of the publication was justifiable. But this may have been on the ground that Parliament was a court of justice, competent to examine into such matters. And, in a subsequent case, some doubt is thrown upon the doctrine that petitions to Parliament are absolutely privileged. *Fairman v. Ives*, 5 Barn. & Ald. 642.

Two other cases were cited by the learned judge in *White v. Nicholls* (*Commonwealth v. Clap*, 4 Mass. 169, and *Budwell v. Osgood*, 3 Pick. 379), but in neither of them was the defamation published in the courts or legislature.

There are many cases, besides those above mentioned, opposed to *White v. Nicholls*. In *Cutler v. Dixon*, 4 Coke, 14 b, it was adjudged that no allegation contained in articles of the peace exhibited to justices was actionable. So, too, in case for exhibiting a scandalous bill against the plaintiff in the Star Chamber, it was resolved by the whole court that for any matter contained

in the bill that was examinable before the court no action lay. *Buckley v. Wood*, 4 Coke, 14 b, pl. 3. Nor can an action be maintained against a witness for a false charge. *Harding v. Bodman*, Hutt. 11; s. c. Brownl. 2. Nor can a presentment of a grand jury be libellous. *Moor*, 627; *Hawk. P. C. c. 73, § 2*; 3 Chitty, Pleading, 870. And it is said to be the better opinion that no want of jurisdiction in the court before which a complaint is preferred will take away this protection; because the mistake of the court is not attributable to the party himself, but to his legal adviser. *Ib.*; note to *Cutler v. Dixon*, *supra*. (But *Hawkins* says that where it appears from the whole circumstances of the case that the prosecution is commenced for the mere purpose of libelling, and without any intention to proceed in it, such an abuse and mockery of public justice should not become a shelter for the guilt which they in reality increased. *P. C. c. 73, § 2.*)

In *Astley v. Younge*, 2 Burr. 807, the declaration charged that the defendant did maliciously make, exhibit, and publish to the Court of King's Bench a malicious, false, and scandalous libel, contained in an affidavit. Plea, that the defendant made the affidavit in his own defence, against a complaint made to the court against him for his refusal to grant an ale license, and in answer thereto, and to an affidavit of the plaintiff. There was a demurrer to this; and after argument, in which counsel for the plaintiff urged that the defendant had admitted that the affidavit was made maliciously, judgment was given for the defendant.

In this case Lord Mansfield mentions the following case, which he says is "vastly stronger." In an action upon

the case by A. against B., the plaintiff declares that he took his oath in this court against B. of certain matters, to bind him to his good behavior; and thereupon B. said, falsely and maliciously, intending to scandalize the plaintiff, "there is not a word true in that affidavit, and I will prove it by forty witnesses." And it was held in arrest of judgment (the jury having found the words false and malicious) that the action was not maintainable; for the answer which B. made to the affidavit was a justification in law, and spoken only in defence of himself, and in a legal and judicial way.

The American cases on this point are not so numerous; but the weight of authority here is also against the doctrine of *White v. Nicholls*. Besides the principal case, *Hastings v. Lusk*, see also *Holmes v. Johnson*, Busb. 44; *Shelfer v. Gooding*, 2 Jones, 175. In the first case the question was, whether the defendant could be sued in an action for malicious prosecution for merely taking out a warrant against the plaintiff, charging him with larceny. And it was held that the action would lie; the court saying that if the plaintiff could not avail himself of that action, he would be entirely without remedy, for that he could not sue for the slanderous words "because they were spoken in the course of a judicial proceeding."

In the other case (*Shelfer v. Gooding*), the court held that an action could not be maintained against a master for words spoken while acting as counsel for his slave in a judicial proceeding, provided the words were material and pertinent to the matter in question. This conclusion, based principally upon *Hastings v. Lusk*, was reached after a review of the cases, including *White v. Nicholls*.

The protection afforded to judicial

proceedings embraces, according to the better opinion, the pleadings in the cause; for the power to strike out scandalous matter, and to punish as for a contempt, is considered a sufficient guaranty against the abuse of the privilege. Townshend, Slander, § 221; *Henderson v. Broomhead*, 4 Hurl. & N. 577. So, of affidavits made in the course of a trial, especially if pertinent: *Garr v. Selden*, 4 N. Y. 91; *Doyle v. O'Doherty*, Car. & M. 418; *Warner v. Payne*, 2 Sandf. 195; and even though the person making it be not a party to the cause: *Henderson v. Broomhead*, *supra*; *Revis v. Smith*, 18 Com. B. 126. Nor does an action lie against a witness for what he may have said: *Revis v. Smith*, *supra*; *Lewis v. Few*, 5 Johns. 13; though (it is said) the testimony be irrelevant, or influenced by malice: *Calkins v. Sumner*, 13 Wis. 193. But see *White v. Carroll*, 42 N. Y. 161; *Allen v. Crofoot*, 2 Wend. 515; *Lea v. White*, 4 Sneed, 111. So, too, judges, while exercising judicial functions, are privileged. *Scott v. Stansfield*, Law R. 3 Ex. 220. So of coroners holding an inquest. *Thomas v. Churton*, 2 Best & S. 475. And so, in general, of words uttered in the *bona fide* discharge of official duty. *Goode-now v. Tappan*, 1 Ohio, 60; *Wilson v. Collins*, 5 Car. & P. 373; *Rector v. Smith*, 11 Iowa, 302; *Dunham v. Powers*, 42 Vt. 1; *Sands v. Robison*, 12 Smedes & M. 704.

(b.) *Proceedings before church organizations*, against members of the church, for violation of their creed, are *quasi* judicial, and afford a protection to the utterance of defamatory language, if it be pertinent to the matter in question. *Farnsworth v. Storrs*, 5 Cush. 412; *York v. Pease*, 2 Gray, 282; *Dunn v. Winters*, 2 Humph. 512.

The case first cited was an action for an alleged libel against a clergyman. The female plaintiff, while a member of the defendant's society, had committed fornication: and for this offence she was, by the alleged libel, excommunicated from the church, after sundry unsuccessful attempts towards bringing her to an acknowledgment of her fault and to repentance. The society, having finally voted to exclude her from further membership, authorized the pastor to draw up the communication complained of, and to read the same before the congregation, which he did. The plaintiff claimed that the libel charged the offence of *adultery*, which was denied. No proof of express malice was offered; and it was held that the action would not lie. Whether the communication, therefore, was absolutely privileged does not clearly appear; and the court carefully distinguished the case from a charge of adultery, which is indictable by statute. It is, however, to be inferred from the language of the Chief Justice that the protection against the charge of fornication was complete. After giving the opinion that the offence charged was fornication, he said that, even upon the ground taken by the plaintiff, that the offence charged was adultery (which charge would not have been true), the defendant was justified. Amongst the powers and privileges of churches given by statute and established by immemorial usage, they had authority to deal with their members for immoral and scandalous conduct; and for that purpose to hear complaints, to take evidence, and to decide; and, upon conviction, to administer proper punishment by way of rebuke, censure, suspension, and excommunication. The proceedings of the church were *quasi* judicial, and, therefore, those who com-

plained, or gave testimony, or acted and voted, or pronounced the result, orally or in writing, while acting in good faith, and within their jurisdiction, were protected by law.

In *York v. Pease*, 2 Gray, 282, the defendant, while on trial for dishonesty before a church meeting, spoke certain defamatory words of the plaintiff; and the judge instructed the jury that if the words were spoken during the progress of the trial, and in good faith, for the purpose of defence, they were privileged. On appeal, this was held correct.

In *Dunn v. Winters*, 2 Humph. 512, the defendant pleaded to an action for a libel, charging the plaintiff, in certain certificates of third persons, with being a party concerned in the malicious killing of the defendant's horses; that the parties were both members of a Baptist church; and that the plaintiff had accused him before the church of falsely accusing him concerning the death of his horses; and that, in defence to this charge, he had produced the certificates containing the alleged libel; and that he had done so honestly and *bona fide*, and not maliciously. To this a demurrer was sustained, on the ground that the communication was privileged.

The case did not raise the question of the extent of the privilege; and nothing was said upon the point. It seems very clear, however, that if the defendant in cases of this kind confines himself to that which is relevant in support of his defence, no inquiry can be made into the motives which may have actuated him in doing so. If the defence be a proper one, it cannot be material that he intended to injure the plaintiff, as well as to protect himself.

(c.) *Reports of Trials and other Public Proceedings*. — As to reports of judicial trials in the public prints, it is settled

law that they must be full, — or at least full enough to give a correct impression of the proceedings, — and without comments. If they be partial, or be followed by comments containing defamatory charges, the presumption of malice will stand.

In *Flint v. Pike*, 4 Barn. & C. 473, the declaration alleged that the defendant had published of the plaintiff a libel, professing to give a short summary of the facts of a certain case in which the plaintiff was attorney. The libel stated that the defendant's counsel in that case was both extremely severe and amusing at the expense of the present plaintiff; and it then professed to give a few outlines of the speech of the said counsel for the defendant; and the part of the speech set out contained some very severe reflections on the conduct of the plaintiff in connection with the suit in which he was then engaged. Plea, that the supposed libel was, in substance, a true report of the trial of the said issue; to which a demurrer was sustained.

Mr. Justice Bayley said that the speeches of counsel were privileged, because they were made for the purpose of influencing the jury in their decision. The auditors and jury had an opportunity to judge how far the observations made were warranted by the evidence; but here the publisher of the libel, not having published the evidence in full, had given his readers no such opportunity. And he referred to cases in which it had been held indictable for parties to publish in the newspapers speeches made by themselves in Parliament, containing defamatory matter. *Rex v. Creevey*, 1 Maule & S. 273; *Rex v. Abingdon*, 1 Esp. 226. He cited also *Lake v. King*, 1 Saund. 120, where a petition presented for the use of members of a committee of the House of

Commons had been circulated elsewhere, which was held unjustifiable. And he was inclined to go even further than the case required, and to hold that the speeches of counsel reflecting on the character of others should not be published even in connection with a full report of the facts.

Mr. Justice Holroyd said that it by no means followed that, because counsel were privileged in argument to utter injurious language, a third person might repeat it to all the world. The repeating of such slander was not done in the course of the administration of justice.

Mr. Justice Littledale thus stated his objection to the plea: "By substance, I apprehend, is meant the inference which the person who published the libel draws from the whole of what passed at the trial. The plea, therefore, amounts to this, that the libel, in his judgment, is a true account and report of the trial. Now, in my judgment, it appears upon the face of the declaration that the libel does not contain a true and accurate report of the trial, because it neither details the speech of the counsel for the plaintiff nor the evidence, nor even the whole of the speech of the counsel for the defendant. But even supposing that this had not appeared on the face of the declaration, and that the libel professed to give the speeches of both counsel, and the evidence, still I think that this plea, which states that the libel contained in substance a true and accurate report of the trial, is not good in point of form. In an action for a libel it is necessary to set out in the declaration the words of the libel itself, in order that the court may see whether they constitute a good ground of action. In *Wright v. Clements*, 3 Barn. & Ald. 503, a declara-

tion stating that the defendant published a libel, containing false and scandalous matter, 'in substance as follows,' and then setting out the libel with innuendoes, was held to be bad in arrest of judgment, because it professed to give only the general import and effect of the libel, and not a copy of it. For the very same reason it appears to me that it is not sufficient to state in a plea that the libel is in substance a true and accurate report of the trial. I think the plea ought to show the libel to be a true account and report of the trial."

In *Stiles v. Nokes*, 7 East, 493, it was held to be libellous to publish a highly colored account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed perjury. And it was decided to be no justification for such insinuation against the plaintiff (who had sworn to an assault upon him by A. B.), that it *did* appear (this being the suggestion in the libel), from the testimony of every person in the room, except the plaintiff, that no violence had been used by A. B.; for *non constat*, thereby that what the plaintiff swore was false. Neither was it a sufficient justification for such a libel, where the extraneous matter was so mingled with the account of the trial as to make it uncertain whether it could be separated, to justify the publication by general reference to such parts of the supposed libel as purport to contain an account of the trial, and that the said parts contained a just and faithful account of the trial. See also *Thomas v. Crowell*, 7 Johns. 264, 272; *Lewis v. Walter*, 4 Barn. & Ald. 612; *Roberts v. Brown*, 10 Bing. 519; *Delegal v. Highley*, 3 Bing. N. C.

950; *Blake v. Stevens*, 4 Fost. & F. 232.

In a case at *nisi prius* (*Turner v. Sullivan*, 6 Law T. N. S. 130) the judge charged the jury that a newspaper has a right to publish an abridged or condensed report of what passes in a court of justice, if it were fair, so as to convey a just impression of what took place; and of this the jury were to judge.

It is equally objectionable if the injurious comments be placed at the head of the report, as a title to the same. In *Lewis v. Clement*, 3 Barn. & Ald. 702, the plaintiff declared for a libel concerning himself as an attorney. The libel began, "Shameful conduct of an attorney;" and then proceeded to give an account of proceedings in a court of law, which contained matter injurious to the plaintiff's professional character. The defendant pleaded that the supposed libel contained a true account of the proceedings in the court of law. But it was held, after verdict for the defendant, that the plea was bad, inasmuch as the words "shameful conduct of an attorney" formed no part of the judicial proceedings. See also *Bishop v. Latimer*, 4 Law T. N. S. 775; *Edsall v. Brooks*, 2 Rob. (N. Y.) 29; *Mountney v. Wotten*, 2 Barn. & Ad. 673; *Hunt v. Algar*, 6 Car. & P. 245.

But of course the editor may use a heading indicative of the nature of the trial. In *Lewis v. Levy*, El. B. & E. 537, the heading of a report was, "Wilful and corrupt perjury;" and the court, after verdict, said that this was merely stating the charge made against the plaintiff. "It may be a heading," it was said, "entirely innocent, simply indicating what is to follow; and it would be a question for

the jury whether it is a fair and *bona fide* report of the proceedings."

If the proceeding be a preliminary and *ex parte* one, it will not, if it be private, be privileged. In *Duncan v. Thwaites*, 3 Barn. & C. 556, the plaintiff sued for a libel published in a newspaper, charging him with having undergone a long examination before a magistrate for an alleged indecent assault upon a young girl, for which he was held to bail. The libel stated that the evidence displayed a complication of indecencies that could not be detailed. One of the pleas was that the alleged libel was a true, fair, and just report of the proceedings before the magistrate, which proceedings were held publicly and openly at the police office. On demurrer the plea was held bad.

Abbott, C. J., said that the case which most nearly resembled the present was *Curry v. Wright*, 1 Esp. 456; s. c. 1 Bos. & P. 523, where a similar plea had been held good. After remarking that that case had not received the sanction of subsequent judges, he said it was distinguishable from the present. That was an account of a proceeding in the King's Bench, a court instituted for final determination as well as for preliminary inquiry, a court whose doors were open to the public. The proceeding now in question was before justices of the peace, and of a kind which they might lawfully conduct *in private*, whenever they thought proper. The proceeding in *Curry v. Wright* terminated in a refusal of the application, and not by putting the subject into a train for further inquiry and trial. The present proceeding terminated finally by holding the accused to bail for trial.

The court, however, did not wish it

to be inferred from these distinctions that they thought that the publication of *ex parte* proceedings even of the King's Bench were allowable.

But in a recent case this intimation that preliminary proceedings in the public courts might not safely be reported is overturned, as is also the distinction suggested between proceedings before magistrates and the superior courts, the statute of 11 & 12 Vict. c. 43, § 12, having made the proceedings before magistrates public. *Lewis v. Levy*, El., B. & E. 537.

The declaration in that case set out reports of three separate days' proceedings respectively (on two adjournments) before a magistrate; the report of the first day stating that the plaintiff was charged with perjury, and an adjournment, but reserving the report; the report of the second day also stating an adjournment in language intimating that there would be a report of the proceedings of the day to which the adjournment was made; and the report of the third stating the discharge of the party charged. The jury found generally that the reports were fair and correct; and the court held that the reports of the first two meetings did not lose their privilege by reason of the proceedings there reported being final.

To the position of counsel that the privilege of reporting legal proceedings was to be confined to those of the superior courts, the reply was that on such a question the dignity of the court could not be regarded. No distinction could be made between a court of *pie poudre* and the House of Lords. "As to magistrates," said the courts, "if, while occupying the bench from which magisterial business is usually administered, they, under pretence of giving

advice, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, reports of what passes before them are as little privileged as if they were illiterate mechanics, assembled in an alehouse." See *Duncan v. Thwaites*, 3 Barn. & C. 556.

Duncan v. Thwaites, *supra*, was distinguished on the ground that there the alleged libel contained a highly colored statement of the reporter, insinuating the guilt of the accused in the assault upon the child; and also on the ground that the result of the examination in the present case was the discharge of the plaintiff, as in *Curry v. Walter*, 1 Bos. & P. 525.

The court proceed to say: "We are not prepared to lay down for law that the publication of preliminary inquiries before magistrates is universally lawful; but we are not prepared to lay down for law that the publication of such inquiries is universally unlawful. Although there are numerous *obiter dicta*, there is no decision to this effect. In the cases relied upon to establish the general doctrine, it will be seen that there were vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it. Here we have a preliminary inquiry before a magistrate, which turned out to be unfounded, and was dismissed. If the whole inquiry had taken place before a magistrate during one hearing, would an impartial and correct report of the proceeding, published in a newspaper next morning, have been actionable? We think not." *Curry v. Wright* was then referred to; and the court con-

tinued: "The difference to be relied upon [between that case and the present] must be the difference of the tribunals. But although a magistrate upon any preliminary inquiry respecting an indictable offence may, if he thinks fit, carry on the inquiry in private, . . . we conceive that, while he continues to sit *foribus apertis*, . . . the court in which he sits is to be considered a public court of justice."

The doctrine of this case of *Lewis v. Levy*, was followed by *Martin, B.*, at *nisi prius*, in *Pinero v. Goodlake*, 15 Law T. N. S. 676, to the effect that reports of public preliminary proceedings before magistrates are privileged, when impartial and correct.

In this country it is held that there is no privilege in publishing an *ex parte* affidavit, made to obtain the plaintiff's arrest. *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548.

In *Stanley v. Webb*, 4 Sandf. 21, it was held that the privilege pertaining to reporting the proceedings of the courts of justice did not extend to the publication of *ex parte* preliminary proceedings before police magistrates; but in that case the report bore the heading, "Extorting money to hush up a complaint," which would of itself, it would seem, have taken away any privilege. The court, however, took the broad position that publications of this sort were not privileged; and the case was soon after followed in *Matthews v. Beach*, 5 Sandf. 256.

It may be doubted, however, if the later English doctrine of *Lewis v. Levy* be not more consistent with American ideas of the liberty of the press: giving protection to fair and full reports of the proceedings of inferior courts, sitting with open doors, in cases where the defendant is discharged.

At common law no privilege is conferred upon the proprietors, publishers, or editors, as such, of the public prints, beyond that of reporting the judicial proceedings of courts of justice, and perhaps the proceedings of the legislature. *Davison v. Duncan*, 7 El. & B. 229; *Sheckell v. Jackson*, 10 Cush. 25; *Hoare v. Silverlock*, 9 Com. B. 20; *Gathercole v. Miall*, 15 Mees. & W. 319; *ante*, p. 109.

In the case first cited the libel complained of was contained in a newspaper report of a public meeting of the Commissioners of the West Hartlepool Improvement Commission. It purported to give an account of the proceedings of the meeting, in the course of which a license from the Bishop of Durham to a gentleman as chaplain of the West Hartlepool Cemetery was laid before the commissioners. Several of the commissioners commented on this, and in so doing used injurious expressions regarding the plaintiff, who, it appeared, had been the late bishop's secretary, and whom they accused of procuring the license by misrepresentations to the present bishop. The defendant pleaded that the meeting was a public one, of a body acting under powers granted by Parliament, and that the report complained of was a fair and truthful statement of what had occurred at the meeting. To this there was a demurrer, on the ground that there was no allegation of the truth of the injurious expressions used by the commissioners; and the demurrer was sustained.

Lord Campbell, C. J., said, that a fair account of judicial proceedings was privileged; but this privilege did not extend to reports of all public meetings. In the former case, the inconvenience arising from the chance of

injury was infinitesimally small compared to the convenience of publicity; but to extend the privilege would be extremely inconvenient, exposing persons to great calumnies. "There is no difference in law," said Mr. Justice Coleridge, "whether the publication is by the proprietor of a newspaper or by some one else. There is no legal duty on either to publish what is injurious to another; and if any person does so, he must defend himself on some legal ground. Now, if the publication be a fair account of a proceeding, not *ex parte*, in a court of justice, it is privileged. The principle on which that proceeds is, as my lord says, that the balance of advantage in having such proceedings public is great. But that principle does not extend to this case; and it never has been laid down that whatever is said at any meeting held for a public purpose, however injurious to an individual, is public property, and may be repeated with impunity."

In *Sheckell v. Jackson*, 10 Cush. 25, the plaintiff sued for a libel in the defendants' newspaper, charging him with treachery and bad faith in regard to money received by him to obtain the manumission of a fugitive slave; and it was held that the fact that there was a general anxiety in the community concerning the fate of the slave was inadmissible in evidence. Without an offer to prove that the plaintiff had been guilty of the deception imputed to him, the general anxiety, it was said, afforded no justification or excuse for charging such misconduct upon the plaintiff.

In *Gathercole v. Miall*, 15 Mees. & W. 319, it was held that the conduct and management, by the clergyman of a parish, of a charitable society in the parish, from the benefits of which dissenters were by his sanction excluded,

was not a lawful subject of comment in a newspaper so as to excuse, under the plea of not guilty, the publication of untrue and injurious matter respecting the clergyman's relation to the charity.

The same principles prevail where the defamatory matter is published in the absence of the proprietor or editor of the publication, and without his knowledge, or contrary to his orders. *Dunn v. Hall*, 1 Ind. 345; *Andres v. Wells*, 7 Johns. 260; *Rex v. Gutch*, *Moody & M.* 493; *ante*, pp. 109, 110.

It is proper to add in this connection that literary criticism, however severe, can in no case be ground for an action of defamation, unless the writer departs from the proper object of such criticism, and attacks directly or covertly the character of another, or seeks to bring his person into contempt and ridicule. The author's writings may be ridiculed, but not his person or character. See *Carr v. Hood*, 1 Camp. 355, 358, note, where Lord Ellenborough directed the jury that if the writer of the criticism complained of (on a book written by the plaintiff) had not travelled out of the work he had criticised for the purpose of slander, the action would not lie; but if they could discover in it any thing personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action. See also *Thompson v. Shackell*, *Moody & M.* 187; *Cooper v. Stone*, 24 Wend. 442; *Stuart v. Lovell*, 2 Stark. 93; *Fraser v. Berkeley*, 7 Car. & P. 621; *Dibdin v. Swan*, 1 Esp. 28; *Kelly v. Tinling*, Law R. 1 Q. B. 701; *Hibbs v. Wilkinson*, 1 Fost. & F. 610; *Tabart v. Tipper*, 1 Camp. 350; *Dunne v. Anderson*, 3 Bing. 88; *Paris v. Levy*,

9 C. B. N. S. 342; *Seymour v. Butterworth*, 3 Fost. & F. 384; *Reade v. Sweetzer*, 6 Abb. Pr. N. S. 9, note.

(d.) *Master giving a "Character" to his Servant.* — The subject of privilege has often been considered, especially in England, in actions between servant and master for false characters given. The general rule is, that where the master gives a character to his servant, it will be presumed, *prima facie*, that the character was given without malice. *Edmonson v. Stevenson*, Buller N. P. 8; *Weatherston v. Hawkins*, 1 T. R. 110; *Fountain v. Boodle*, 3 Q. B. 11; *Rogers v. Clifton*, 3 Bos. & P. 587; *Child v. Affleck*, 9 Barn. & C. 403.

The case of *Fountain v. Boodle*, *supra*, illustrates the point, and also shows that, if there is any evidence that the statement complained of was false to the knowledge of the defendant, the plaintiff establishes a case for the jury. This case was an action for a libel. It appeared that the plaintiff had been employed as governess in the defendant's family for upwards of a year, during which time the defendant had twice recommended her for other similar positions, and that she was now dismissed in an abrupt manner, without cause assigned, and had lost a new engagement in consequence of the defendant giving the following answer to an inquiry respecting her qualifications: "I parted with her on account of her incompetency, and not being lady-like nor good-tempered," to which this postscript was added: "May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." The plaintiff gave general evidence of her lady-like manners and good temper. No evidence was given for the defendant. And Lord Denman instructed the jury that the

communication was privileged unless there was direct evidence that it was influenced by some malicious feeling; but if a *prima facie* case of intentional falsehood had been made out, the defendant ought to have shown the assertion to have been made under a belief of its truth. The question was, therefore, whether there was sufficient proof that the defendant had been influenced by an improper feeling in making a false statement knowingly. And the direction was held right, there being some evidence of malice.

The mere fact that the communication was voluntarily made does not necessarily prevent its being privileged; but the manifestation of forward and officious zeal in giving a character, uninvited, to the prejudice of his former servant would be a material guide to a jury in ascertaining the real motive of the defendant. In *Pattison v. Jones*, 8 Barn. & C. 578, a master had written a letter giving a character to his servant, without application, but afterwards wrote another in answer to inquiries made concerning the plaintiff's character, stating the grounds on which he had discharged him. And it was held that, assuming the second letter to have been privileged, it was proper for the jury to say whether it was a *bona fide* communication.

Mr. Justice Bayley said that it was not necessary to a privileged communication that the party who makes the communication should be put into action in consequence of a third party's putting questions to him. He was of opinion that the master, when he thought that another was about to take into his service one whom he knew ought not to be taken, might set himself in motion, and do some act to in-

duce that other to seek information from and put questions to him. The answers to such questions, given *bona fide* with the intention of communicating such facts as the other party ought to know, would, though containing slanderous matter, come within the scope of privileged communications.

In another case *Coltman, J.*, said: "If a neighbor make inquiry of another respecting his own servants, that other may state what he believes to be true. But the case is different when the statement is a voluntary act; yet even in this case the jury is to consider whether the words were dictated by a sense of the duty which one neighbor owes to another." *Rumsey v. Webb*, Car. & M. 104. See also *Dixon v. Parsons*, 1 Fost. & F. 24; *Fryer v. Kinnersley*, 15 C. B. n. s. 429; *Gardner v. Slade*, 13 Q. B. 796; *Bennett v. Deacon*, 2 C. B. 628; *Picton v. Jackman*, 4 Car. & P. 257; *Coxhead v. Richards*, 2 C. B. 569; *Krebs v. Oliven*, 12 Gray, 239.

In *Coxhead v. Richards*, just cited, two of the judges expressed the opinion that though a defamatory communication were made to a third party without previous inquiry, yet if it was of importance to the interests of that party that such communication should be made, it was privileged if made *bona fide*, in the reasonable belief that it was true. The other two judges thought that where there was no relation between the parties which created a duty to make the defamatory communication, and it was not required for the interest of the person *who made it*, the importance of it to a third party to whom it was made would not confer any privilege upon it, if made voluntarily, and not in answer to any inquiry. See *Davis v. Reeves*, 5 Irish Com. L. 79,

90, where the Chief Baron concurred in the doctrine first mentioned; *Smith v. Higgins*, 16 Gray, 251, where it is said that no one can be held responsible for a statement or publication tending to disparage the reputation of another, if it is made in the discharge of a social or moral duty, or is required in order to protect one's own interest or that of another. In such cases it often happens that the communication must be made voluntarily, if at all.

On the other hand, the fact that the communication was made upon request will not always justify it. In *Joannes v. Bennett*, 5 Allen, 169, it was held that a letter to a woman, containing libellous matter concerning her suitor, could not be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents.

(e.) *Communications made to the proper public authorities*, upon occasions of seeking redress for wrongs or injuries suffered, or upon matters in which the public are concerned, or in which the party making or receiving the communication is interested, will be presumed to have been made *bona fide*, until malice is proved. As where the defendant charged the plaintiff before a constable with being a thief, and trying to rob him of part of her wages; it appearing that the words had been spoken to the officer in his character as constable, after having sent for him to take the plaintiff into custody. Lord Eldon, C. J., said that the evidence given of the speaking of the words laid in the declaration was not such as to induce him to direct the jury to find a verdict for the plaintiff. Words used in the course of a legal proceeding, however hard they might bear upon the party of whom they were used, were

not such as would support an action for slander. In this case they had been spoken under a belief of the fact, and when the defendant was seeking redress. But it is held in England that, though it may be the duty of all persons to give information to the crown's proper officers concerning abuses of offices of trust, still the falsehood and absence of all ground for a communication of the kind is sufficient proof of malice when no excuse is offered in evidence on the part of the defendant. *Robinson v. May*, 2 Smith, 3.

At a town-meeting, having under consideration an application from the assessors of the town for reimbursement for expenses incurred in defending a suit, on the ground that it was brought against them for acts done in their official capacity, a statement of a voter and tax-payer that they had therein perjured themselves is privileged if made in good faith, with a belief in its truth, and without actual malice. *Smith v. Higgins*, 16 Gray, 251.

In a case in New York (*Van Wyck v. Aspinwall*, 17 N. Y. 190), the plaintiff sued the defendants for a libel alleged to have been contained in a report made by them to the Secretary of the Treasury. The plaintiff was an examiner and inspector of drugs for the port of New York, under appointment of said secretary. The defendants answered that they were trustees of the College of Pharmacy in the city of New York, — an institution incorporated for the purpose, among other things, of cultivating and improving pharmacy, and of making known the best modes of preparing medicines, with a view to the public benefit. Complaints had been made to the trustees that spurious and adulterated drugs and medicines had

been imported into New York, contrary to law. Thereupon the board of trustees appointed the defendants a committee to investigate such complaints, and report to the board. They proceeded to do so, and made a joint report in writing to the board, intending to have it presented to the Secretary of the Treasury, which was done. The report contained the statement charged as libellous, which narrated several instances in which impure and adulterated drugs had been passed through the custom-house upon the plaintiff's certificate to their genuineness and good quality.

The answer further averred that said report was forwarded to the secretary for the purpose of procuring the enforcement of the act of Congress; that it was forwarded with reasonable cause, in good faith; and that the defendants were moved solely by a conscientious desire to discharge their duties to the public, to prevent the unlawful importation and use of adulterated medicines, and without malice towards the plaintiff.

A demurrer to the answer was overruled. No action could be maintained upon such a publication, said the court, without proof of malice and want of probable cause. The occasion for the publication repelled the inference of malice, which, but for the privilege, would have been drawn from its injurious character. And the doctrine of Lord Campbell in *Harrison v. Bush*, 5 El. & B. 344; s. c. 32 Eng. Law & E. 173, was quoted with approval, to the effect that a communication made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, whether legal or only moral and of imperfect obligation, is privileged, if made to a person having a corresponding interest or duty, though it contain

criminatory matter which, without this privilege, would be slanderous and actionable.

In *Vanderzee v. McGregor*, 12 Wend. 545, also an action for libel, it appeared that the statement complained of was contained in a memorial signed by the defendant and others, inhabitants of the town of Wilton, presented to the board of excise of the town, remonstrating against the granting to the plaintiff a license to keep a tavern there; in which it was stated that the plaintiff was a professional pettifogger; that he stirred up suits; that he endeavored to have justice's courts held at his house; and that he demanded juries, when unnecessary: for the purpose of bringing large numbers of people together at his tavern. The court held the memorial privileged.

This case was decided upon the authority of *Thorne v. Blanchard*, 5 Johns. 508. The libel in that case was a petition to the council of appointment of New York, praying the removal of the plaintiff from the office of district attorney, and assigning as the ground of such request that the plaintiff grossly abused and perverted the powers of his office. It was held, upon a review of the early cases, that the communication was privileged.

Gray v. Pentland, 4 Serg. & R. 420, was also referred to, where the plaintiff complained of an alleged libel contained in an affidavit to the Governor of Pennsylvania concerning his conduct in an office held at the governor's will; and it was held necessary to prove express malice.

In *Lawler v. Earle*, 5 Allen, 22, it was held that statements made by the owner of a building which had been set on fire to persons employed by him in it, accusing a certain person of being

the incendiary, and cautioning them against him, were, if made in good faith, privileged. So, too, if the owner of stolen goods, in a search for them at the house of the suspected thief, accuse him of the larceny in answer to a question as to his object, the words are privileged. *Brow v. Hathaway*, 13 Allen, 239.

But if the communication, though made to a public officer, be made to one who has no authority over such matters, it will not be privileged so as to require proof of malice. *Blagg v. Sturt*, 10 Q. B. 899; *ib.* 906; *Simpson v. Down*, 16 Law T. n. s. 391. See *Harrison v. Bush*, 5 El. & B. 344. Though if the defendant, by mistake, have made the communication to the wrong person, *quære*, as to whether the privilege be removed. See *Harrison v. Bush*, *supra*. There is a *nisi prius* case deciding that where a timekeeper employed on public works, on behalf of a public department, having written a letter to the secretary of the department (the wrong person), imputing fraud to the contractor, the question for the jury is, Was the letter written in good faith, and in the discharge of duty? if it was, it was privileged. *Scarll v. Dixon*, 4 Fost. & F. 250.

Whether a communication which, if addressed to competent authority, would be privileged, loses its privilege by being published in the newspapers, is not in all cases clear. In *Simpson v. Down*, 16 Law T. n. s. 391, the plaintiffs alleged that the defendants had published in a local newspaper a letter in which they charged the plaintiffs with serious breaches of duty which they owed as contractors for the erection of a jail in H. The defendants were members of the town council, and, from their business, competent judges

of the work. It was held that the communication was not privileged, though it would have been if it had been made by the defendants as councillors to the town council.

But where the plaintiff held the office of wey warden, and a rate-payer of the district, in a letter published in a newspaper, imputed that the plaintiff had paved and drained his own premises with the public money, it was held, in an action against the proprietors of the newspaper, that there was no limit to comments on the public acts of a man who held or claimed a public office, unless the jury found that such comments were made maliciously. *Harle v. Catherall*, 14 Law T. N. s. 801.

It is not altogether clear whether the learned judge in this case regarded the communication privileged; but the report shows no proof of malice outside of the communication. The inference, therefore, is that the jury were allowed to find malice in the newspaper article itself, or in some lack of inquiry by the defendant; which they did, apparently, the verdict having gone for the plaintiff. This inference is confirmed (in connection with the ruling that criticism on a public officer was not libellous without proof of malice) by a remark of the judge that, while he was not to decide that matter, his impression was that the communication was libellous.

It was said in this connection that, had the action been brought against the writer of the alleged libel, the communication clearly would not have been privileged.

Perhaps the proper distinction is this: Where the plaintiff is directly amenable to the appointing power, charges through a newspaper are not privileged, and (if false) are *prima facie* malicious; but where the plaintiff

cannot be directly reached by the power that gave him his position, as in the case of a public officer elected for a year, without a provision for removal, the newspaper, being the proper and usual medium for informing the public of the shortcomings of its servants, is a privileged organ of communication; and whether the action be against the writer of the alleged libel, or against the publisher or editor of the paper, express malice must be proved.

In *Hatch v. Lane*, 105 Mass. 394, it appeared that the defendant, a baker, employing several drivers in delivering bread in T. and adjoining towns, had inserted in a newspaper published in T. a card that the plaintiff, "having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business." The plaintiff requested the judge to rule that the community had no such interest in the subject-matter of the card as would authorize the defendant to make it through the medium of a newspaper; but the judge refused so to rule, and instructed the jury that the publication was privileged if made in good faith. And the instruction was upheld. The court said that the fact that a communication was made in the hearing of others than the parties immediately interested would not of itself defeat the defence of privilege. See *Brow v. Hathaway*, 13 Allen, 239.

See in this connection *Taylor v. Church*, 8 N. Y. 452, where it was held that one who undertook, for an association of merchants in New York, to ascertain the pecuniary standing of merchants and traders residing in other places, who were customers of some of the members of the association, and who furnished reports to all the members of

the association, irrespectively of the question whether they had an interest in the question of the standing of such merchants and traders, was liable for any false report made by him prejudicial to the credit of the subject of it, though made honestly and from information upon which he relied. The publication could not be considered privileged.

(f.) *Communications between persons holding confidential relations* to each other are also privileged. *Batson v. Skene*, 5 Hurl. & N. 855; *Davis v. Reeves*, 5 Irish Com. L. 79; *Picton v. Jackman*, 4 Car. & P. 257.

In *Davis v. Reeves*, *supra*, it was held that a person's general attorney, though not employed in any legal proceedings for him, is a proper person to give information in his client's interest; and that such, though defamatory of third persons, will be protected if *bona fide*.

So a defamatory communication made by the owner of a house to his tenant, the occupier, imputing disgraceful and immoral conduct to some of the inmates, may be privileged if made *bona fide*, as between landlord and tenant. *Knight v. Gibbs*, 3 Nev. & M. 469. See also *Cockayne v. Hodgkinson*, 5 Car. & P. 543.

Communications to auctioneers by persons interested in the property to be sold have sometimes been held privileged. In *Blackham v. Pugh*, 2 C. B. 611, the defendant had given notice to an auctioneer not to part with the proceeds of a certain sale, as the plaintiff had committed an act of bankruptcy. A majority of the court held that the communication, having been honestly made by the defendant in a matter concerning his own interest as a creditor of the plaintiff, was privileged.

When a confidential relation is es-

tablished between two persons with regard to an inquiry of a private nature, whatever takes place between them, relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection, as well as what passed at the original interview; and it is a question for a jury whether any further conversation on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between them, so as to be entitled to the same protection. *Beatson v. Skene*, 5 Hurl. & N. 838.

(g.) *Publications in vindication of character* sometimes come within this class of cases of privileged communications. As where an attorney published a letter in vindication of the character of one of his clients, the letter containing defamatory imputations upon another who had preferred charges of conspiracy against the client. In an indictment for libel, *Cockburn, C. J.*, instructed the jury that if they were of opinion that the defendant published the letter honestly, and for the vindication of his client's character, in answer to scandalous charges published against him, then the occasion was privileged; and if the jury were further of opinion that the terms used in the letter were such as, under all the circumstances, might well be deemed warranted, then the publication would be protected. That the privilege may also extend to civil actions, see *Koenig v. Ritchie*, 3 Fost. & F. 413.

This doctrine is, indeed, always to be understood with the limitation suggested above, that the time and mode of the publication are suited to the occasion. For it seems to be clear that

whether the occasion and circumstances supply an absolute or merely qualified justification, dependent on the question of actual malice, they do not extend to justify publication not warranted by the occasion and circumstances. Starkie Slander, 287.

Indeed, it is a general principle that communications otherwise privileged lose their protection if they be made in a manner unnecessarily injurious to the plaintiff, or with undue exaggeration and excess of defamatory language. See *Brown v. Croome*, 2 Stark. 297; *Toogood v. Spyring*, ante; *Fryer v. Kinnersley*, 15 C. B. N. s. 422; *Cooke v. Wildes*, 5 El. & B. 328.

In *Brown v. Croome*, *supra*, the defendant had published in a newspaper an advertisement strongly reflecting upon the plaintiff, who had been adjudged a bankrupt; and Lord Ellenborough held the same libellous, though the advertisement had been published with the avowed purpose of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security. Counsel for the defence then proposed to show that this was the only mode that could have been adopted, since the creditors were numerous and scattered. To this Lord Ellenborough said that if it could be shown that an advertisement in the newspaper was the only possible means of communicating notice of the circumstances, that might be sufficient to vindicate the mode; but a communication sufficient for the purpose might have been made in measured language. The mode, he further observed, made an essential distinction which applied to all the cases; as in the case of a brief to counsel, the publication between the attorney and the counsel might not be libellous, and yet,

if it were to be printed and published, there might be a libel in every line. Every unauthorized publication to the detriment of another was, in point of law, to be considered malicious.

(h.) *The principle in all these cases seems to be, that defamatory words are prima facie malicious. Some occasions rebut the presumption of malice; and those are called cases of privileged communication. And if the words be more defamatory than the occasion requires, that again raises the presumption of malice. Cooke v. Wildes*, 5 El. & B. 328, 335, Erle, J.; *Wright v. Woodgate*, 2 Cromp., M. & R. 573.

Whether the occasion for writing or speaking the defamatory language, which would otherwise be actionable, repels the inference of malice and constitutes it a privileged communication, is a question of law; but whether the defendant was prompted by external malice must, in these as in other cases, be decided by the jury. *Cooke v. Wildes*, 5 El. & B. 328; *Somerville v. Hawkins*, 10 Com. B. 583; *Taylor v. Hawkins*, 16 Q. B. 308. Thus, in *Fryer v. Kinnersley*, 15 Com. B. N. s. 422, the jury had negatived (external?) malice; but it was held that, as the communication complained of (which would otherwise have been privileged) contained excessive language, its protection was gone, and that malice, therefore, must be inferred from the words.

(i.) *Northampton's Case. Repeating Defamation.*—The doctrine of the fourth resolution in *Northampton's Case*, 12 Coke, concerning the repetition of defamation, has been generally overruled both in England and in America; and the rule of law now is that, whether the words be written or spoken, it is neither a justification for the defendant to say that he heard or received them from

another person, naming him, nor does this make the words privileged so as to cast the burden upon the plaintiff of proving them to have been repeated maliciously. They are still, if defamatory, *prima facie* malicious, justifying a verdict for the plaintiff; and if he would rebut the presumption, he must show that he repeated the words on a justifiable occasion, believing them to be true, or that the rumor was in fact true. In other words, he must either rebut the presumption of malice, or prove the truth of the report. *McPherson v. Daniels*, 10 Barn. & C. 270; *Ward v. Weeks*, 7 Bing. 211; *Tidman v. Ainslie*, 10 Ex. 63; *Watkin v. Hall*; *Law R. 3 Q. B. 396*; *Maitland v. Bramwell*, 2 Fost. & F. 623; *Dole v. Lyon*, 10 Johns. 447; *Inman v. Foster*, 8 Wend. 602; *Stevens v. Hartwell*, 11 Met. 542; *Sans v. Joerris*, 14 Wis. 663. *Contra*, *Haynes v. Leland*, 29 Maine, 233.

The point is well illustrated in the recent case of *Watkin v. Hall*, above cited. The declaration in that case stated that the defendant had spoken of the plaintiff (who was chairman of the South-eastern Railway Company) the words, "You have heard what has caused the fall [in the stocks of the said railway company], — I mean the rumor about the South-eastern chairman having failed;" meaning thereby that the plaintiff had become embarrassed in his pecuniary affairs and insolvent. The defendant pleaded that he meant, and was understood by the by-standers to mean, that there had been and was then a rumor current on the Stock Exchange about the chairman of the South-eastern Railway Company having failed, and not that the plaintiff had become embarrassed and insolvent; and that it was true there had been and then was a rumor on the Stock Exchange that the

chairman of the said railway company had failed.

The court held, on demurrer, that the plea was not an answer to the declaration, since the existence of the rumor did not justify the repetition of the slander contained in it, without proof that the defendant believed it to be true, and that he spoke the words on a justifiable occasion.

Mr. Justice Blackburn quoted with special approbation the following language of Little Dale, J., in *McPherson v. Daniels*, 10 Barn. & C. 263, 272: "It is competent to a defendant, upon the general issue, to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on grounds of public policy, allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess. Now, a defendant by showing that he stated, at the time when he published slanderous matter of a plaintiff, that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion or under circumstances which the law, on grounds of public

policy, allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law to recover, damages. As great an injury may accrue from the wrongful repetition as from the first publication of slander. The first utterer may have been a person insane or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows, not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant, and may consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant."

MALICIOUS PROSECUTION.

VANDERBILT v. MATHIS, leading case.

BYNE v. MOORE, leading case.

GRAINGER v. HILL, leading case.

Note on Malicious Prosecution.

Historical aspects of the subject.

Termination of the prosecution.

Want of probable cause.

Malice.

Damage.

Malicious abuse of process.

VANDERBILT v. MATHIS.

(5 Duer, 804. Superior Court, New York City, February, 1856.)

To maintain an action for malicious prosecution, three facts, if controverted, must be established: 1. That such prosecution was determined in favor of the plaintiff before the action was commenced. 2. The want of probable cause. 3. Malice. Consideration of these three elements. An acquittal of the plaintiff *held*, not *prima facie* evidence of want of probable cause.

THE plaintiff complained that the defendant had falsely, maliciously, and without any reasonable or probable cause, charged him with committing perjury in a certain case before R. E. Stilwell, a commissioner of the United States for the Southern District of New York, whereupon the plaintiff was arrested and brought before said commissioner, and upon examination acquitted.

The errors of law alleged are stated in the opinion.

L. B. Shephard, for plaintiff. *J. S. Williams*, for defendant.

BOSWORTH, J. To maintain an action for malicious prosecution, three facts, if controverted, must be established: 1. That the prosecution is at an end, and was determined in favor of the plaintiff. 2. The want of probable cause. 3. Malice.

In such an action it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that, alone, is not *prima facie* evidence of the want of probable cause. *Gorton v. De Angelis*, 6 Wend. 418.

It is equally essential that the former prosecution should appear to have been maliciously instituted. Malice may be inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events, merely because they may find the absence of probable cause.

Unless the evidence, in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of malice, other evidence, in support of it, must be given.

Evidence as to the conduct of the defendant, in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication, are properly admitted to prove malice. Such evidence must be given as will justify a jury in finding the existence of malice.

The rule is uniformly stated, that, to maintain an action for a former prosecution, it must be shown to have been without probable cause, and malicious. *Vanduzer v. Linderman*, 10 Johns. R. 106; *Murray v. Long*, 1 Wend. 140; 2 Stark. Ev. 494; *Willans v. Taylor*, 6 Bing. 183.

The judge, at the trial, charged that the fact that the plaintiff was discharged before the magistrate showed, *prima facie*, that there was no probable cause for the arrest, and shifted the burden of proof from the plaintiff to the defendant, who was bound to show affirmatively that there was probable cause.

He was requested to charge "that the discharge of Vanderbilt was not *prima facie* evidence of the want of probable cause." This he refused to do. To this refusal to charge, and to the charge as made, the defendant excepted.

He also charged "that, if probable cause is made out, the question of malice becomes immaterial, except as bearing on the question of damages."

"This question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

He was requested to charge "that the jury could not find a verdict for the plaintiff, unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe, from the evidence, that, in making the complaint, the defendant acted from malicious motives." This the judge declined to do, and to his refusal so to charge the defendant excepted.

Although the evidence which establishes the want of probable cause may be, and generally is, such as to justify the inference of malice, yet we understand the rule to be, that when it is a just and proper inference from all the facts and circumstances of the case, upon all the evidence given in the cause, "that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts and circumstances disprove that which is of the essence of the action, viz., the malice of the defendant in pressing the charge."

In *Bulkeley v. Smith*, 2 Duer, 271, the court stated the rule to be, "that, in order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in making it. Malice is a question of fact, which, when the case turns upon it, must be decided by the jury."

Story, J., in *Wiggin v. Coffin*, 3 Story, 1, instructed the jury that two things must concur to entitle a plaintiff to recover in such an action. "The first is, the want of probable cause for the prosecution; the second is, malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit."

In *Vanduzer v. Linderman*, 10 Johns. R. 106, the court said: "No action lies merely for bringing a suit against a person without sufficient ground. To maintain a suit for a former prosecution, it must appear to have been without cause and malicious."

If the charge must be understood to mean, that if the want of probable cause was established, the plaintiff was entitled to recover, although the jury should believe, from the whole evidence, that in making the complaint the defendant did not act from malicious motives, then we deem it to be erroneous. This construction is the only one of which the language of the instruction appears to be susceptible; for the judge, in charging the jury, stated that the "question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

Malice in fact is that kind of malice which is to be proved. When malice may be, and is inferred, from the want of probable cause, it is actual malice which is thus proved.

There is no theoretical malice which can satisfy this rule, and which can coexist with the established fact, that the prosecution

was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice.

The question of malice may be a turning-point of the controversy, in an action of this nature.

The want of probable cause may be shown; and yet, upon the whole evidence, in any given case, it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such that a jury cannot properly doubt the honesty and purity of the motive which induced the former prosecution, and if they fully believe that it was instituted from good motives, and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict.

The charge made, and which was excepted to, must be deemed to have been made to give the jury a rule of action, in disposing of the case upon the whole evidence. We think it was not only calculated to mislead, but was erroneous.

A new trial must be granted, with costs to abide the event.

BYNE v. MOORE.

(5 Taunt. 187. Common Pleas, England, Michaelmas Term, 1813.)

Damages not proved. Where, in an action for maliciously indicting for an assault, the plaintiff gave no other evidence than the bill returned "not found," and was thereupon nonsuited, the court refused to set aside the nonsuit.

THIS was an action for a malicious prosecution. The declaration alleged that the defendant, maliciously intending to injure the plaintiff and bring him into public scandal, infamy, and disgrace, and to cause him to be imprisoned for a long space of time, and thereby to impoverish, oppress, and ruin him, went before Dr. Rose, being one of the justices of the peace assigned, &c., for the county of Surrey, and before him, being such justice, falsely and maliciously, and without any reasonable or probable cause whatever, charged the plaintiff with having assaulted and beat the defendant; and upon such charge the defendant falsely and maliciously, and without any reasonable or probable cause,

caused and procured the said Dr. Rose, being such justice, to grant his warrant under his hand and seal for apprehending the plaintiff and bringing him before Dr. Rose, or some other justice of the peace for Surrey, to be dealt with according to law, for the said supposed offence; and the defendant, by virtue of that warrant, afterwards, wrongfully and unjustly, and without any reasonable or probable cause, procured the plaintiff to be arrested and imprisoned, and to be detained until he was carried before the Lord Mayor of London, being one of the justices of the peace for the city of London, to be examined before him touching the said supposed crime, and further caused the plaintiff to be carried or conveyed in custody before a certain other magistrate at the public office, Union Street, assigned to keep the peace for the county of Surrey, to be examined before him touching the supposed crime, and to be by the said justice obliged to find sureties to enter into a recognizance to the king, before some justice, for the plaintiff's personal appearance at the then next general quarter sessions of the peace for Surrey, and then and there to answer the complaint of the plaintiff for assaulting and beating him, by reason whereof the plaintiff, in pursuance of the recognizance so entered into, at the next general quarter sessions of the peace for Surrey, on the 14th of January, 1812, before Randle Jackson, Esq., and certain justices of the peace for that county, did personally appear pursuant to the said recognizance; and the defendant did further falsely and maliciously, and without any reasonable or probable cause, cause a bill of indictment to be preferred against the plaintiff (which the declaration set out), for an assault on the defendant; and the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, at the said sessions exhibited and preferred the said indictment against the plaintiff to the jury of the grand inquest then and there at the said sessions sworn to inquire for the king and the body of the county, and then and there maliciously and falsely gave evidence before the same jurors, of and concerning the matters contained in that indictment, and endeavored and strove, as much as in him lay, to cause and procure the said indictment to be found a true bill by the same jurors against the plaintiff, when in truth the whole matter contained in that indictment was false, scandalous, and contrary to truth, and so it then and there after their examination of witnesses thereon

returned the indictment to the court of the said session "not found," whereupon the plaintiff and his sureties were then and there discharged of their recognizance, and the prosecution became and was ended and determined. There was a second count for preferring the indictment only. The defendant pleaded the general issue. Upon the trial of this cause at the Surrey Lent Assizes, 1812, before Macdonald, C. J., it appeared that the warrant issued by Dr. Rose stated the charge to be for violently assaulting the defendant. The charge which the defendant in fact made was for assaulting and striking. It was objected that there was a variance between the offence described in the warrant, the offence described in the charge made, and the offence averred in the allegation of a charge for assaulting and beating, and the Chief Baron, considering the variance as fatal, nonsuited the plaintiff.

Best, Serjt., for plaintiff. *Shepherd*, Serjt., for defendant.

MANSFIELD, C. J. I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any. I can understand the ground upon which an action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it; this bill was a piece of mere waste paper. All the cases in Buller's *Nisi Prius*, 13, are directly against this action, for the author speaks of putting the plaintiff to expense, and affecting his good fame, neither of which could be done here. If this action could be maintained, every bill which the grand jury threw out would be the ground of an action. The judge, too, might certify in this cause against the costs, if the damages had been under 40s.

HEATH J., concurred.

CHAMBER, J. It would be a very mischievous precedent if the action could be supported on this evidence.

Rule discharged.

GRAINGER v. HILL and Another.

(4 Bing. N. C. 212. Hilary Term, 1838.)

Malicious Abuse of Process. In an action for abusing the process of the court, in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined, or to aver that the process was sued out without reasonable or probable cause.

THE declaration stated that the plaintiff, before the time of the committing of the grievances by the defendants hereinafter mentioned, was master and proprietor of a certain smack or vessel, hereinafter mentioned; and the plaintiff, being such proprietor, and having occasion to borrow a certain sum of money to meet his needs, applied to and requested the defendants to lend and advance to him the sum of 80*l.*, which they, the defendants, agreed to do, upon having the repayment thereof secured to them by a mortgage of the said smack or vessel; and it was thereupon agreed by and between the plaintiff and defendants that a mortgage of the said vessel should be accordingly made and given; and that the sum of money so to be advanced and lent by the defendants to the plaintiff should afterwards be repaid by the plaintiff to the defendants on a certain time then agreed upon, and not yet elapsed, to wit, the 28th of September, 1837; and that in the mean time the plaintiff should retain the command of the said smack or vessel, and prosecute and make voyages therein for his own profit and advantage; and thereupon, afterwards, to wit, on the 30th of September, 1836, the defendants accordingly lent and advanced to the plaintiff, upon and in pursuance of the said agreement, and upon the security aforesaid, the said sum of 80*l.*; and the plaintiff also thereupon, in pursuance also of the said agreement, by a certain indenture then made, signed, sealed, and delivered by the defendants of the one part and the plaintiff of the other part (the indenture was here set out), mortgaged the said vessel, subject to a proviso of redemption on payment of 80*l.*, together with interest for the same in the mean time, at and after the rate of five per cent per annum, on the 28th of September, 1837, then and now next ensuing; and the plaintiff did, in and by the said indenture, covenant, promise, and agree to and with the defendants that the

plaintiff should well and truly pay, or cause to be paid, to the defendants the said sum of 80*l.*, with interest for the same, after the rate aforesaid, at or on the day and time therein and hereinbefore expressed and appointed for payment of the same. That the defendants wrongfully, illegally, and maliciously contriving to injure, harass, and distress the plaintiff, and to compel the plaintiff, by and through fear and duress of imprisonment, to give up and relinquish to them certain goods and chattels of and belonging to the plaintiff, and not included in the said mortgage security, to wit, a certain register and a certain certificate of the register of the said smack or vessel, and without the possession of which the plaintiff could not go to sea or prosecute his said voyages in manner aforesaid as agreed upon by and between the plaintiff and defendants, as the defendants well knew, long before the said time so appointed as aforesaid for the payment of the said sum of 80*l.*, to wit, on, &c., called upon and requested payment of and from the plaintiff of the said sum of 80*l.*, and then threatened to arrest him for the same unless he immediately paid to them the amount thereof. That, upon the plaintiff's refusing so to do, the defendants wrongfully and unjustly contriving and intending as aforesaid, and to imprison, harass, oppress, injure, and impoverish the plaintiff, and to cause and procure him to be arrested and imprisoned, and to prevent his making and prosecuting any voyages whatsoever in his said smack or vessel, and wholly to ruin the plaintiff thereby, well knowing that the plaintiff was wholly unprepared and unprovided with bail, heretofore, to wit, on the 26th of November, 1836, falsely and maliciously caused and procured to be sued and prosecuted out of the court of our lord the king of the bench at Westminster, for the said sum of 80*l.*, a certain writ of our lord the king called a *capias* (setting it out). That the defendants, contriving and intending as aforesaid, afterwards, to wit, on, &c., wrongfully, illegally, and maliciously caused and procured the said writ to be, and the same was then, marked and indorsed for bail for 95*l.* 17*s.* 6*d.*, being the sum of 80*l.* and certain alleged costs, charges, and expenses, making together the sum of 95*l.* 17*s.* 6*d.*; and the said writ being indorsed for bail as aforesaid, the defendants afterwards and before the return thereof, to wit, on, &c., contriving and intending as aforesaid, wrongfully and maliciously caused the plaintiff to be, and he

then was, arrested by his body, under and by virtue of the said writ, and was thereupon imprisoned, and kept and detained in prison for a long time, to wit, for the space of twelve hours then next following, until he, the plaintiff, not being prepared or provided with bail to the said action, by and through fear and duress of imprisonment, was forced and compelled to give up and relinquish to them the goods and chattels before mentioned, to wit, the said register and certificate of registry, and did so give up and relinquish the same; and the defendants thence hitherto wrongfully and unjustly, and against the consent and will of the plaintiff, forcibly and against law kept and detained the same from the plaintiff. By means of which said several premises, the plaintiff being, as the defendants before and after the time of the said arrest well knew, wholly unprepared and unprovided with bail, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful business and affairs by him during that time to be performed and transacted, but especially was prevented and deterred from making and prosecuting with the said smack or vessel, divers, to wit, four several voyages with and in the said smack or vessel, to wit, from London to Caen and back again, and lost and was deprived thereby of all the benefits, profits, and advantages which would have otherwise flowed and accrued to him the plaintiff therefrom, and was by means of the premises otherwise greatly injured and damnified.

There was a count in trover for a ship's register. The defendants pleaded the general issue.

At the trial it appeared that in September, 1836, the plaintiff, by deed, mortgaged to the defendants for 80*l.* a vessel of which he was owner as well as captain. The money was to be repaid in September, 1837; and the plaintiff was to retain the register of the vessel in order to pursue his voyages.

In November, 1836, the defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register, and for this purpose, after threatening to arrest the plaintiff unless he repaid the money lent, they made an affidavit of debt, sued out a *capias* indorsed for bail in the sum of 95*l.* 17*s.* 6*d.* in an action of *assumpsit*, and sent two

sheriff's officers with the writ to the plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present, perceiving he could not be removed, one of the defendants said to the sheriff's officers, "Don't take him away; leave the young man with him." The officers then told the plaintiff that they had not come to take him, but to get the ship's register; but that if he failed to deliver the register, or to find bail, they must either take him, or leave one of the officers with him.

The plaintiff being unable to procure bail, and being much alarmed, gave up the register.

The plaintiff afterwards came to an arrangement with the defendants, was discharged from the arrest, paid the costs, repaid the money borrowed on mortgage, and received from the defendants a release of the mortgage deed. No further steps were taken in the action of *assumpsit*.

Upon this arrangement a caption fee, which had been charged and paid by the plaintiff to the sheriff's officers, was repaid by the defendants to the plaintiff.

A verdict having been given for the plaintiff, *Taddy*, Serjt., moved for a nonsuit.

Talfourd, Serjt., and *James*, showed cause. *Taddy*, Serjt., and *R. V. Richards*, in support of the rule.

TINDAL, C. J. This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel, which, in September, 1836, he mortgaged to the defendants for the sum of 80*l.*, with a covenant for repayment in September, 1837, and under a stipulation that, in the mean time, the plaintiff should retain the command of the vessel, and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff through duress to give up the register of the vessel, without which he could not go to sea, before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a *capias*, indorsed to levy 95*l.* 17*s.* 6*d.*, and kept him imprisoned, until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained, by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in *trover* for the register. The defendants pleaded the general issue; and, after a verdict

for the plaintiff, the case comes before us on a double ground, under an application for a nonsuit, and in arrest of judgment.

The first ground urged for a nonsuit is, that the facts proved with respect to the writ of *capias* do not amount to an arrest. It appears to me that the arrest was sufficiently established.

The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same; that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ. Here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.

As to the count in trover, if the taking of the register was wrongful, that taking was of itself a conversion, and no demand and refusal was necessary as a preliminary to this action. It seems to me that taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking, and, therefore, this rule must be discharged.

PARK, J. I am of the same opinion. According to the authority in *Buller's Nisi Prius* this was a good arrest.

The argument as to the omission to prove the termination of the defendants' suit, and to allege want of reasonable and probable cause for it, has proceeded on a supposed analogy between the present case and an action for a malicious arrest. But this is

a case *primæ impressionis*, in which the defendants are charged with having abused the process of the law, in order to obtain property to which they had no color of title ; and, if an action on the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances. I admit the authority of the cases which have been cited, but they do not apply to the present.

As to the count in trover, the compulsion under which the register was obtained was tantamount to a conversion, and a demand and refusal was not necessary in order to support this action. In *Parker v. Patrick*, 5 T. R. 175, where the defendant had regained possession of goods of which he had been deprived by a fraud, and the plaintiff, who had given value for them without notice of the fraud, sued him in trover, and obtained a verdict, it was never objected that he should have demanded the goods in order to commence his action. So, in *Wyatt v. Blades*, 8 Campb. 396, the act of bankruptcy was committed the 8th of December ; the goods were seized on the 8th of February following, and carried to a broker's ; on the 12th of the same month the commission issued ; and notice was afterwards served upon the sheriff not to sell the goods, as they belonged to the assignees. In consequence, the goods were never sold, but still remained at the broker's, and no demand of them was ever made. But Lord Ellenborough said : " Had the goods not been removed, it would have been difficult to say there was any conversion ; but I think the removal of them after the act of bankruptcy is a sufficient conversion to maintain the action, notwithstanding the subsequent notice." That is a strong case to show that, where the circumstances attending the taking are tantamount to an actual conversion, a demand is not necessary to support an action of trover.

VAUGHAN, J. I think that in law this was clearly an arrest. If the party is under restraint, and the officer manifests an intention to make a caption, it is not necessary there should be actual contact. With respect to the termination of the defendants' suit, all the facts in the declaration were proved. The termination of that suit is not alleged, nor was it necessary, because what the plaintiff complains of is an abuse of the process of law, for the purpose of extorting property to which the defendants had no claim ; that abuse having been perpetrated, and the defendants

having attained their end by it, it is immaterial whether their suit was terminated or not. The case is altogether distinct from cases of malicious prosecution or arrest, in which it is always the course to allege and prove that the former proceeding is at an end.

So, with respect to the argument in arrest of judgment, this case stands on its own peculiar circumstances. It is an action for abusing the process of law, by employing it to extort property to which the defendants had no right; that is of itself a sufficient cause of action, without alleging that there was no reasonable or probable cause for the suit itself.

With respect to the count in trover, if there be a tortious taking, no previous demand is necessary to support the plaintiff's action. Whether such taking be by force or fraud makes little or no difference in the right to maintain the action; but this taking was as much a forcible taking as if a pistol had been presented at the plaintiff's head.

BOSANQUET, J. I thought at the trial, and am still of the same opinion, that these circumstances amounted to an arrest. The plaintiff resigned his personal liberty under the authority of the writ, and actual contact was not necessary to complete the arrest.

Then, as the record stands, it was not necessary to prove, and, I think, under the circumstances of this case, it was not necessary either to allege or prove, the termination of the defendant's suit. This is not an action for a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done. The process was enforced for an ulterior purpose, — to obtain property by duress, to which the defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the court. And that distinction is an answer as well to the argument in arrest of judgment as to the argument in support of a nonsuit.

As to the count in trover, if the register was obtained by duress of imprisonment, a demand and refusal were not necessary to establish a conversion. And as it is clear that the register was illegally obtained by duress, under an abuse of the process of this court, this rule must be

Discharged.

Historical. — The action for malicious prosecution is intimately related to that for conspiracy; so much so as at first to lead to the supposition that it grew out of that action. As will be seen in the note on Conspiracy, various statutes were passed in aid of persons who had been falsely and maliciously

indicted or appealed of crimes by a conspiracy among the defendants; and when, therefore, several were concerned in the prosecution of the plaintiff, the writ of conspiracy was employed in seeking redress. So, too, the lawyers had become so accustomed to the use of this writ, in the frequency of fraudulent combinations and conspiracies to move trials, that it was often, if not always, resorted to when the prosecution had been instigated by a single party; in which case the conspiracy was alleged to have been entered into *inter the defendant et quendam R.* 1 Saund. 230, note; Herne's Pl. 147.

In the latter case, however, the averment of a conspiracy was unnecessary, and was rejected as surplusage. The action was then regarded as an *action upon the case*, says Fitzherbert. Nat. Brev. 116. See also *Muriel v. Tracy*, 6 Mod. 169, per Lord Holt; *Skinner v. Gunton*, 1 Saund. 228, and note, 230.

And the same was true when the writ was brought against several defendants who were alleged to have falsely and maliciously indicted the plaintiff of a *trespass*, and the plaintiff failed in his proof as to all but one. This would have been fatal had the original prosecution been for a felony; but, being for a trespass, it was considered that the case was not properly conspiracy, and the plaintiff was allowed to recover as in an *action upon the case*. *Ib.* (This subject is considered at length in the note on Conspiracy, *post.*)

Now, actions on the case originated in the St. of Westm. 2, c. 24 (13 Edw. 1), in which statute are also found the earliest *definite* provisions concerning the right of action for malicious prosecutions. This statute antedates the

first act concerning conspiracies by eight years; but actions for conspiracy lay at common law, as appears in the note on that subject; while no trace of an action for a simple malicious prosecution (that is, in any other form than by writ of conspiracy) is to be found before the Statute of Westminster the Second. Indeed, for a long time afterwards, as well as before (2 Inst. 383, *infra*), the writ of conspiracy was resorted to in such cases, as we have stated.

The twelfth chapter of the statute just mentioned is entitled "Malicious Appeals." It provided that, "forasmuch as many, through malice, intending to grieve others, do procure false appeals to be made of homicides and other felonies by appellors, having nothing wherewith to make satisfaction to the king for their false appeal, nor to the parties appealed for their damages; it is ordained that when any so appealed of felony surmised upon him doth acquit himself in the king's court in due manner, either at the suit of the appellor, or of our lord the king, the justices before whom such appeal shall be heard and determined shall punish the appellor by one year's imprisonment. And such appellors shall, nevertheless, restore to the parties appealed their damages, according to the discretion of the justices, having respect to the imprisonment or arrestment that the party appealed hath sustained by reason of such appeals, and to the infamy that they have incurred by the imprisonment or otherwise, and shall, nevertheless, make a grievous fine to the king. And if, peradventure, such appellor be not able to recompense the said damages, it shall be inquired by whose abetment or malice such appeal was commenced, if the party appealed

desire it; and if it be found by that inquest that any man is abettor through malice, at the suit of the party appealed, he shall be distrained by a judicial writ to come before the justices; and, if he be lawfully convict of such malicious abetment, he shall be punished by imprisonment, and shall be bound to restitution of damages, as before is said of the appellor."

In the thirty-sixth chapter of the same act (relating to Distresses upon Malicious Suits in Courts Baron) it is provided that, "forasmuch as lords of courts, and others that keep courts, and stewards, intending to grieve their inferiors [those within their jurisdiction], where they have no lawful means of grieving them, do procure others to move matters against them, and to put in surety and offer pledges, or to purchase writs, and, at the suit of such plaintiffs, compel them to follow the county, hundred, wapentake, and other like courts, until they have made fine with them at their will; it is ordained that it shall not be so used hereafter. And if any be attached upon such false complaints, he shall replevy his distress so taken, and shall cause the matter to be brought afore the justices, before whom, if the sheriff, or other bailiff, or lord, after that the party distrained hath framed his plaint, do avow the distress lawful by reason of such complaints made before them, and it be replied that such plaints were moved maliciously against them by the solicitation or procurement of the sheriff, or other bailiffs, or lords, that replication shall be admitted; and, if they be convict hereupon, they shall make fine to the king, and, nevertheless, restore treble damages to the parties grieved."

Chapter thirty-seven provides that

sheriffs should not send strangers to take distresses; and that no distress should be taken but by bailiffs sworn and known.

Chapter forty-three contained a provision that hospitallers and templars (orders of religious knights) should draw no man into suit unduly, upon pain of damages to the parties aggrieved and a grievous punishment unto the king.

These are the earliest provisions as to malicious suits that we have definite knowledge of. There are later statutes, 1 Edw. 3, st. 1, c. 7, and 1 Rich. 2, c. 13; and there were earlier acts, which are not wholly preserved. In the Mirror, c. 4, § 16, it is said that there were those who condemned men by corrupt judgment, though they did not directly kill them; and so there were "wilful manslaughterers who appeal or indict innocent persons of mortal offence, and prove not their appeals or their indictments; and, although these used to be judged to death, nevertheless, King Henry 1 ordained this mitigation, that they be not judged to die, but that they have corporal punishment; and of those who wrongfully appeal," continues the Mirror, "ye are to distinguish; for if any one hath appealed another so falsely that there was no color of appeal by judgment, or other reasonable proof, in such case he was to be adjudged to make satisfaction to the party, and afterwards to suffer corporal punishment." And it is added, that King Canute used to judge mainprisors according as the principals, when their principals appeared not in judgment, which law was somewhat modified by Henry 1. See also 2 Inst. 383. As to the punishment of unjust judges, see Ancient Laws and Institutes of England, p. 385, c. 15, Laws of King

Canute; ib. p. 483, c. 39, Laws of William the Conqueror; ib. pp. 524, 536, c. 34, Laws of Henry 1. As to the punishment of false accusers, see ib. p. 385, c. 16; ib. p. 538, c. 34, § 7, and note; 2 Inst. 383, 384. As to the Roman law, see Paullus, tit. 12, § 1; Dig. lib. 48, tit. 18, 22.

Staundforde, the earliest writer on the criminal law, says that damages were awarded *at common law* to the defendant in a false appeal of felony, "as appears by M. 48 Edw. 3, fol. 22 [pl. 3], and by the recital of the [above] St. of Westm. 2, c. 12. For," says he, "common law and common reason agree that when a man has sustained a prosecution by which his goods, land, life, and good-will are in jeopardy without cause or any other foundation than the malicious accusation of a person, and is found a true and loyal man, and is duly acquitted of that of which he is appealed, he ought to have amends for this against his false accuser; and if the accuser is not able to pay, then against those who procured or abetted him in prosecuting the appeal." P. C. 167 b. But he adds that, before the statute, the damages were recovered by writ of conspiracy, and not otherwise. See also 2 Inst. 383, to the same effect. This act of Westm. 2, c. 12, however, gave a speedier remedy to the injured party than he had before. Ib. Damages seem to have been taxed in favor of the defendant, upon his acquittal, if he prayed for them. 8 Edw. 4, p. 3; Staundf. P. C. 171. But the advantage of this speedy remedy extended only to appeals; and in the case of *indictments* redress was still by writ of conspiracy.

From all this it appears that, though rights of action and punishments for malicious prosecutions were recognized and given in the *written law* in far

earlier times than were writs of conspiracy, the redress for the former injury was at first, and for a long time, pursued by the latter remedy. But what is still more interesting, we have clear evidence that, from the very twilight of the English law, it has been unlawful for men to harass each other with vexatious suits. How much of the very early law, however, was mere declaration, and how much was real and carried into execution, is another question.

Lord Coke comments much in his 2d Inst. pp. 383-387, upon chapter twelve of the above St. of Westm.; and it will be useful to observe how the law was understood in his day, founded, as it largely was, upon the cases in the Year-Books. The words, *per malitiam*, at the beginning of the act, he says, "open divers windows for the better understanding and enlightening of the general words of this statute. 1. If the appellee be first indicted of the felony whereof he is appealed, the appeal shall not be understood to be commenced *per malitiam*, because the plaintiff [prosecutor] hath a foundation to build upon, viz., an indictment by the oath of twelve or more men, so as it shall be presumed that the plaintiff was moved to his appeal by the indictment, *et non per malitiam*; for in those days (as yet it ought to be) indictments taken in the absence of the party were formed upon plain and direct proof, and not upon probabilities or inferences. But if the indictment be insufficient, then it is in judgment of law as no indictment; and then the appeal may, notwithstanding, be commenced *per malitiam*, *et sic in similibus*; or, if it be a good indictment, and found after the appeal commenced, yet may the appeal be commenced *per malitiam*. 2. If one be appealed of murder, and it is found

by verdict that he killed him *se defendendo*, this shall not be said to be *per malitiam*, because he had a just cause, for *quod quisque ob tutelem corporis sui fecerit, jure id fecisse videtur; et sic de similibus*. 3. The heir, or other near of kin, may abet the wife plaintiff in the appeal." Hoyland's Case, 6 Edw. 3, 33. "This statute doth extend both to acquittals in deed and to acquittals in law. Acquittals in deed, as either by verdict or by battle; and in that case, when the plaintiff yields himself 'creant,' or vanquished in the field, the judgment shall be that the appellee shall go quit, and that he shall recover his damages against the appellor; but, if the plaintiff had been slain, then no judgment can be given against a dead person. Acquittals in law, as if two be appealed in felony, the one as principal, and the other as accessory, and both of them plead not guilty, &c., and the jury doth acquit the principal; in this case by law the accessory is acquitted, and shall recover damages by this act against the appellant, &c., or may have his writ of conspiracy at the common law. . . . If one be appealed as accessory to two principals, and one of the principals is acquitted, the accessory shall recover no damages until the other principal be acquitted. . . . This writ [the judicial writ of the statute] is given in lieu of the writ of conspiracy at the common law; the abettors coming in upon this process may traverse the abetment, because they were strangers to the verdict; and if the defendant that sueth the distress shall be nonsuit, yet may he have a new writ, and it is not peremptory to him. And albeit the jury find neither the time nor the place where the abetment was, yet, if they find the abettors, it is sufficient; for, when the plaintiff appeareth,

the defendant may show time and place in good time."

No distinct writs of malicious prosecution, as we have said, are to be found in the books; if an action were brought, the writ of conspiracy seems always to have been used while the pleadings were oral (at which time the writ answered the purpose of the modern declaration). But, after written pleadings came into use, we find distinct declarations for malicious prosecutions upon the statute for this purpose "made and provided," referring apparently to the Statute of Malicious Appeals, *supra*. In these declarations there is no allegation of conspiracy or deceit, and they evidently derive their force from the Statute of Westm. 2, c. 24, *supra*, as actions on the case. Declarations of this kind appear in Rastell's Entries, 43 b, 44, in cases of 7 Hen. 7, rot. 59, and 10 Hen. 7, rot. 38. The latter case was an action against several for abetting the false appeal of the plaintiff; thus showing that it was not necessary at this time, even in such a case, to sue in conspiracy.

In the later abridgments the modern term "malicious prosecution" is used; and it is said that this injury gives rise to a writ of conspiracy or to an action upon the case in the nature of conspiracy. 1 Comyns's Dig. 338, Action upon the Case for a Conspiracy, A.; 1 Rolle's Abr. 114, l. 30; 1 Bacon's Abr. 117, 118, Action on the Case, H. See also Cranbanck's Case, 2 Rolle's Rep. 49, where in arrest of judgment it was vainly moved that the title of the plaintiff's bill was trespass upon the case, while the whole record was that of conspiracy.

In these times, it was sufficient, whether the remedy adopted was by writ of conspiracy or by an action upon

the case in the nature of a writ of conspiracy, to prove malice and the acquittal of the plaintiff. And if the latter form of redress was employed, it was not even necessary to prove an acquittal, malice being sufficient. Doddridge, *J.*, in *Cranbanck's Case*, 2 Rolle's Rep. 48; 1 Rolle's Abr. 112, l. 50, 114, l. 20; 1 Comyns's Dig. 339. But it was otherwise of conspiracy, where there had been a valid indictment. *Ib.*

Comyns, *ut supra*, gives the following cases where an action on the case lies without an acquittal; where an *ignoramus* is found; where the party is not indicted; where the indictment is insufficient; where the party was imprisoned or received other damage, though the defendant proceeded no further; or where a *nolle prosequi* was entered. See also 1 Bacon's Abr. 117.

In a writ of conspiracy, however, for a false indictment, it was necessary that the party should be acquitted by a verdict such as would enable him to plead *autrefois acquit* if again indicted for the same crime. 2 Selw. N. P. 1062 (11th ed.). But if there were no indictment, and a nonsuit in appeal was ordered, the writ lay. Fitzh. N. B. 114, 115. See note on Conspiracy, where the writ is given.

Thus far we have no mention of the doctrine concerning reasonable and probable cause, as applied at the present time. It is now a part of the plaintiff's case to allege and prove (besides malice) a want of probable cause for the prosecution, as will appear more fully below. But formerly this was not required of him; the defendant had the burden of proving that he had acted upon probable cause. In *Knight v. Jermin*, Croke Eliz. 134, Gawdy, *J.*, said that if the defendant had acted upon good pre-

sumptions, "he ought to plead them, as that he found him in the house, &c., or the like cause of action." And Wray, *C. J.*, agreed. So in *Pain v. Rochester*, 2 Croke Eliz. 871, the plaintiff declared in conspiracy for procuring himself falsely and maliciously to be indicted of robbery; and the defendants in their plea alleged facts showing that they had cause for arresting the plaintiff.

Savil v. Roberts, 1 Salk. 13, seems to be the first case in which it was declared to be the duty of the plaintiff to show want of probable cause. In this case Lord Holt said that the action for malicious prosecution, by indictment, was not to be favored; and, therefore, said he, "if the indictment be found by the grand jury, the defendant shall not be obliged to show a probable cause, but it shall lie on the plaintiff's side to prove an express rancor and malice."

From the time of this case (A.D. 1699), which is often referred to as the leading modern authority, the rule has prevailed that the plaintiff must give some evidence that the prosecution was instituted without reasonable and probable cause; and this, as will hereafter appear, is true in all cases, whatever the nature of the prosecution.

Malicious suits, generally for civil causes, were sometimes sued by a writ of deceit. Fitzh. N. B. 98; 2 Inst. 444; Register, Judicial Writs, 37, where such a writ of deceit is given upon the Statute of Merchants. See also 1 Comyns, Dig. 347, Action upon the Case for a Deceit, A. 4, where several cases are given, among them one or two criminal cases.

Lord Coke informs us that the thirtysixth chapter of the Statute of Westminster the Second, as to distresses upon malicious suits in courts baron (*supra*), was made in affirmance of the

common law, and to add a greater punishment than was given at common law. And he says that the act extended only to replevins, and not to any other form of redress. 2 Inst. 444.

Termination of the Prosecution. — The action for a malicious prosecution cannot be maintained until the prosecution has terminated; for otherwise the plaintiff might obtain judgment in the one case and yet be convicted in the other, which would of course disprove the averment of a want of probable cause. See *Fisher v. Bristow*, 1 Doug. 215; *Cardival v. Smith*, 109 Mass. 158; *O'Brien v. Barry*, 106 Mass. 300. And it is a part of the plaintiff's case to show that the prosecution has terminated. *Ib.*

It is necessary that the prosecution should have terminated with an acquittal of the plaintiff, if carried through, even though the tribunal be one from which there is no appeal. For to allow the action after a conviction in such a case would virtually be to allow an appeal. *Besébé v. Matthews*, Law R. 2 C. P. 684; *Bacon v. Towne*, 4 Cush. 217; *Parker v. Huntington*, 7 Gray, 87; *Boyd v. Cross*, 35 Md. 194. See *Herman v. Brookerhoff*, 8 Watts, 240; *Jones v. Kirksey*, 10 Ala. 839; *Driggs v. Burton*, 44 Vt. 124. The last-named case holding that where a magistrate can neither acquit nor convict, but only bind over or discharge, and discharges the accused, the prosecution is at an end, so far as to warrant an action for malicious prosecution. See *Cardival v. Smith*, 109 Mass. 158; *Sayles v. Briggs*, 4 Met. 421, 426. But if the proceeding ended in a compromise, there is no ground for the action. *Clark v. Everett*, 2 Grant, 416; *Mayer v. Walter*, 64 Penn. St. 283.

But it has been doubted whether a

conviction is conclusive evidence of probable cause, so as to bar an action for malicious prosecution. 1 American L. C. 270 (5th ed.). "The true principle," say the editors of the work cited, "appears to be that a verdict of guilty is strong *prima facie* evidence, but capable of being rebutted, by showing that it was obtained exclusively or mainly by the false swearing of the defendant, or by other corrupt or undue means;" citing *Witham v. Gowen*, 14 Maine, 362; *Payson v. Caswell*, 22 Maine, 212.

The learned editors, however, refer with approval in the same note to the cases which have decided that if the prosecutor acted *bona fide* upon legal advice in preferring the charge, the action cannot be sustained. See *infra*. If this be true, how can it be that, after the advice of counsel has been ratified by a conviction of the prisoner, the prosecutor is liable to this action? He is then in a worse position, notwithstanding the verdict of the jury, than he would have been had his charge been denied by the jury and the prisoner acquitted; for in that case he could have securely relied upon the advice of counsel.

Nor do we see how the action can be sustained after a conviction, though the prosecutor did not prefer the charge upon legal advice. The verdict of twelve men, with all the facts, *pro* and *contra*, before them, is quite as strong evidence of probable cause as the advice of an attorney. And it is not upon grounds of estoppel that this view is sustained. It could not be thus sustained, as the editors referred to suggest, since the parties to the two actions are not the same. The object of the evidence is not to show the party guilty; to attempt to show that con-

clusively by the record of conviction would be impossible, for the reason just stated. The object is merely to prove probable cause; and a conviction upon trial may well prove that conclusively.

The criterion of probable cause is to be found in the conduct of the prudent man; and when it is ascertained what the prudent man would have been justified in doing, the court decide (where nothing else is in the way) upon the liability of the defendant. Now whether a prudent man would have deemed himself to have probable cause is a question of law; but the court must judge of this from personal observation or the testimony of others. The latter is the usual course in such cases, as is seen in their view of the advice of counsel. But the jury also represent the prudent man; their opinion then should also be accepted. See *Resenstein v. Brown*, 7 Phil. 144; *Herman v. Brookerhoff*, 8 Watts, 240.

It may be, however, that, where the conviction was before a magistrate or justice of the peace, and on appeal the then defendant was acquitted, this prevents the first verdict from being conclusive of probable cause. See *Witham v. Gowen*, 14 Maine, 362; *Burt v. Place*, 4 Wend. 591; *Mayer v. Walter*, 64 Penn. St. 283, 288. But see *Reynolds v. Kennedy*, 1 Wils. 232; *Herman v. Brookerhoff*, 8 Watts, 240.

It is not necessary to show an acquittal in *ex parte* proceedings that are based upon affidavits, the truth of which is not controvertible; as in an action for maliciously, and without reasonable or probable cause, going before a magistrate and procuring the plaintiff to be held to bail to keep the peace. *Steward v. Gromett*, 7 C. B. N. S. 191.

And it is held in the case of a civil

action that the failure of the plaintiff to enter in court his writ, upon which he has caused the arrest, is such a final determination of the case as to enable the defendant to bring suit. *Cardinal v. Smith*, 109 Mass. 158.

Want of Probable Cause. — The want of reasonable and probable cause, sufficient to sustain the plaintiff's case, is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused. *Tindal, C. J.*, in *Willans v. Taylor*, 6 Bing. 183, 186.

In *Busst v. Gibbons*, 30 Law J. Ex. 75, it was held sufficient for the plaintiff to show that the defendant, in causing the plaintiff's arrest, had acted on very slight circumstances of suspicion. The case was this: A robbery had been committed by S., who had immediately absconded. The plaintiff, who had been a fellow-workman with him, had been heard to say that he (the plaintiff) had heard a few hours before the robbery that S. had absconded, and that S. had previously told him (the plaintiff) that he intended to go to Australia. S. had also been seen, early in the morning after the robbery, coming from a public entry leading to the back-door of the plaintiff's house. The defendant, who was the plaintiff's employer, having been informed of these circumstances, caused the plaintiff to be apprehended, and charged before magistrates with the robbery. The charge was dismissed. In the action for this prosecution the judge told the jury that these facts showed a want of probable cause for making the arrest; and he was sustained on appeal. See also *Holburn v. Neal*, 4 Dana, 120; *Swain v. Stafford*, 4 Ired. 392; *ib.* 398.

The question of probable cause, too, is to be judged by the circumstances existing at the time of the arrest for the offence charged; and it is immaterial that the prosecutor subsequently ascertained his mistake. *Swaim v. Stafford, supra*. In the case cited the prosecution was for the alleged larceny of certain ribbons which the plaintiff had been examining in the defendant's store; and it was held that, if the facts were sufficient to excite in the mind of a reasonable man suspicion that the person charged with the offence was guilty (and the court held that, if the evidence was true, there was probable cause), it was not a good reply that the defendant had afterwards found the ribbons in the folds of a bolt of cloth that had lain on the counter at the time of the alleged larceny.

The question, in short, in these cases is, not whether there was in fact a sufficient cause for the prosecution (for the acquittal shows that there was not), but whether the prosecutor, as a reasonable man, believed there was. The very term, "reasonable and probable cause," necessarily implies this.

But the belief must be that of a reasonable man, else the most baseless prosecutions would be safe, owing to the difficulty of disproving the prosecutor's belief in the truth of the charge; and hence it is necessary that the facts should be stated upon which the prosecutor based his action.

That the test is the belief of a reasonable or prudent man, see *Muns v. Dupont*, 3 Wash. C. C. 31, where Mr. Justice Washington thus defined probable cause: "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the

offence with which he is charged." So, in *Bacon v. Towne*, 4 Cush. 238, Shaw, C. J., said that probable cause meant such a state of facts as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the accused is guilty. In *Barron v. Mason*, 31 Vt. 189, 197, Redfield, C. J., said: "It is not enough to show that the case appeared sufficient to this particular party; but it must be sufficient to induce a sober, sensible, and discreet person to act upon it, or it must fail as a justification for the proceeding upon general grounds." See also *Braveboy v. Cockfield*, 2 McMull. 270; *Burlingame v. Burlingame*, 8 Cowen, 141; *Travis v. Smith*, 1 Barr, 234; *Boyd v. Cross*, 35 Md. 194; *Cole v. Curtis*, 16 Minn. 182; *Spangler v. Davy*, 15 Gratt. 381; *Carl v. Ayers*, 53 N. Y. 14; *Mowry v. Whipple*, 8 R. I. 360; *Shaul v. Brown*, 28 Iowa, 37; *Bauer v. Clay*, 8 Kans. 580.

And it is held that, though there was in point of fact ground for the prosecution, if this was not known to the prosecutor, or was disbelieved by him, there is evidence of the want of probable cause. *Delegal v. Highley*, 3 Bing. N. C. 950; *Broad v. Ham*, 5 Bing. N. C. 722; *Bell v. Percy*, 5 Ired. 83.

In *Delegal v. Highley, supra*, the defendant pleaded that he had caused the plaintiff to be arrested "upon and with a reasonable and probable cause," and then proceeded to state the facts upon which that cause was alleged. To this plea there was a demurrer, alleging that it contained no statement that the prosecutor, at the time he caused the charge to be made, had been informed of or knew, or in any manner acted on, the facts stated in his plea. And the demurrer was sustained. "If the de-

fendant," said Tindal, C. J., "instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, it is obvious that he must allege as a ground of defence that which is so important in proof under the plea of not guilty, viz., that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion."

In *Broad v. Ham*, *supra*, it appeared that the defendant, having in fact a *prima facie* ground for his charge, did not believe it at the time; and this was held some evidence of want of probable cause. "In order to justify a defendant," said the same Chief Justice, "there must be a reasonable cause, — such as would operate on the mind of a discreet man; there must also be a probable cause, — such as would operate on the mind of a reasonable man: at all events such as would operate on the mind of the party making the charge, otherwise there is no probable cause for him. I cannot say that the defendant acted on probable cause if the state of the facts was such as to have no effect on his mind." See also *Ravenga v. Mackintosh*, 2 Barn. & C. 693; *Blachford v. Dod*, 2 Barn. & Ad. 179; *Huntley v. Simson*, 2 Hurl. & N. 600; *Williams v. Banks*, 1 Fost. & F. 557; *Haddrick v. Heslop*, 12 Q. B. 267.

In *Haddrick v. Heslop*, *supra*, the plaintiff complained of a prosecution for perjury, which the defendant had instituted against him for the purpose, as the plaintiff alleged, of suppressing evidence; and it was proved that the defendant, on being told that there was

not sufficient ground for the indictment, declared it was no matter, and that it would stop the plaintiff's mouth in a proceeding in which he would be likely to give evidence against the defendant. It was held that the judge was right in asking the jury whether the prosecutor believed at the time he preferred the indictment that the defendant had really been guilty of perjury, and whether he instituted the prosecution *bona fide*, under such a belief, or from an improper motive.

But in some cases it has been held that the question of the defendant's liability for the prosecution depends upon the actual non-existence of probable cause; so that if there was in fact probable cause, whether he knew it or not, he cannot be liable. *Mowry v. Miller*, 3 Leigh, 561; *Hickman v. Griffin*, 6 Mo. 37; *Adams v. Lisher*, 3 Blackf. 241.

In *Mowry v. Miller*, *supra*, the court said: "The law requires the plaintiff in this action to set forth that the prosecution was without probable cause. But as this is merely because no man can maintain an action for a malicious prosecution where there *was* probable cause, it is obvious that those words should be made to refer to the state of fact as it respects the person prosecuted, and not to the degree of knowledge of that fact in the party prosecuting."

The court, in *Adams v. Lisher*, *supra*, state the ground of decision thus: "This suit is founded on a prosecution set on foot by the defendant against the plaintiff for a wrong that affects the public; and therefore the defendant stands on the footing of the most favored class of prosecutors. It was an action of trespass for cutting and carrying away, from lands belonging to the public, timber. . . . The gist of that action was the

trespass; and proof of cutting and carrying away any one of those trees would be sufficient to sustain the action. And if he were guilty of the trespass, he cannot maintain this action, although he may have been acquitted in the District Court where he was prosecuted; and it is immaterial whether the defendant knew him guilty or not, if he can now prove the fact that he was guilty, or if he can even prove that there was probable cause to suspect him of being guilty, it is sufficient for him."

The ground taken in *Mowry v. Miller* is clearly *petitio principii*; for the very question is, whether the action cannot, in the case under consideration, be maintained, notwithstanding the actual existence of a cause of prosecution. The case referred to was overruled in *Spengler v. Davy*, 15 Gratt. 381, 388.

The same is true, perhaps, of the position assumed in *Adams v. Lisher*. The defendant, say the court, was doing the public a service in instituting the prosecution, and should therefore be protected. He should be protected if he was acting legally; otherwise, not. But to attempt to do a public service is not necessarily a legal thing. The difficulty, therefore, is not solved.

The substance of the declaration is that the defendant has preferred against the plaintiff a false charge, maliciously and without sufficient ground. Now it must be observed that the plaintiff is an innocent man, as his acquittal has established; and if the prosecutor had no knowledge of the facts which might have (clearly) justified him, — that is, if he did not have an affirmative reasonable belief that the accused was guilty, — he has preferred a false charge, knowing it to be false. How, then, can he escape liability? Probable cause in fact existed; but the prosecutor, bent

as he is on mischief to a man whom he knows, or is bound to presume, to be innocent, prefers his charge entirely regardless of his existence, or, as in *Broad v. Ham*, positively disbelieving in its existence. Upon what principle of law can one who has assumed such a wicked position afterwards, when he sees that he has involved himself in trouble, claim a protection which he either directly rejected or had not the decency, in his haste and malice, to attempt to discover?

But if probable cause can be strained in any way to cover such a case, the difficulty may be obviated, it would seem, by framing the declaration, like that in *Pasley v. Freeman*, *ante*, p. 1, for the making a false charge, knowing it to be false, and intending thereby to injure the plaintiff.

It is a good defence to this action that the defendant, before preferring the charge, laid the matter before professional counsel, and has acted *bona fide* upon the advice given, however erroneous. *Snow v. Allen*, 1 Stark. 502; *Ravenga v. Macintosh*, 2 Barn. & C. 693; *Hewlett v. Cruchley*, 5 Taunt. 277; *Hall v. Suydam*, 6 Barb. 84; *Walter v. Sample*, 25 Penn. St. 275; *Cooper v. Utterbach*, 37 Md. 282; *Olmstead v. Partridge*, 16 Gray, 381.

In *Snow v. Allen*, *supra*, it appeared that the plaintiff's attorney had notified the prosecutor, before the arrest, that the proceeding was illegal; but the prosecutor's attorney, relying, though erroneously, on judicial authority and the opinion of a special pleader, persisted in his course; and the result was the action for malicious prosecution, in which the plaintiff failed. Lord Ellenborough said: "How can it be contended here that the defendant acted maliciously? He acted ignorantly."

The Attorney-General: "He proceeded to arrest after full notice of the irregularity of his proceedings." Lord Ellenborough: "But he was acting under what he thought was good advice. It was unfortunate that the attorney was misled by Higgins's Case; but unless you can show that the defendant was actuated by some purposed malice, the plaintiff cannot recover."

But the prosecutor must have acted *bona fide* in obtaining and following the advice given, or his defence may fail. *Ravenga v. Macintosh*, 2 Barn. & C. 693; *Sappington v. Watson*, 50 Mo. 83; *Cooper v. Utterbach*, 37 Md. 282. In *Ravenga v. Macintosh*, Mr. Baron Bayley said: "I have no doubt that in this case there was a want of probable cause. I accede to the proposition that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description. A party, however, may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury whether he acted *bona fide* on the opinion, believing that he had a cause of action. The jury in this case have found, and there was abundant evidence to justify them in drawing the conclusion, that the defendant did not act *bona fide*, and that he did not believe that he had any cause of action whatever. Assuming that the defendant's belief that he had a cause of action would amount to a probable cause, still, after the jury have found that he did not believe that he had any cause of action whatever, the judge would have been bound to say that he had not reasonable or probable cause of action."

The finding of the jury in this case established both malice and want of probable cause in the prosecutor; the former, in that he did not act *bona fide* upon the advice given, and the latter, in that he did not believe he had any cause of action. See *supra*. But had the jury merely found that he had improperly obtained or improperly acted upon the advice, the plaintiff would only have established the malice of the defendant. The facts in his possession at the time of the charge might still have given a reasonable and probable cause for the prosecution; and since, if he had this, he was justified, notwithstanding his malice, the action would not lie.

If this be true, there is ground for criticising the remark in *Walter v. Sample*, 25 Penn. St. 275, that suppression of facts, evasion, or falsehood, in stating the case to counsel, would make the prosecutor liable. This would, at most, only show malice (see *Cooper v. Utterbach*, 37 Md. 282); and it may be that, had he stated the case as he understood it, he would have been deemed to have probable cause. Or, he may have come into possession of other facts after asking the advice and before preferring the charge. And the plaintiff must disprove the presumption of probable cause which the law accords to public prosecutions. *Walter v. Sample, supra*.

To put the case in more direct form, if the defendant plead that he preferred the charge upon the advice of counsel, after stating fully the facts, it will not be sufficient for the plaintiff to reply that the defendant did not obtain or act on the advice in good faith. He must also show that he did not believe the advice, or other facts showing that he was not in possession of reasonable

and probable cause. We have therefore stated *supra* that the defence may fail if the prosecutor do not act in the matter *bona fide*.

This defence of having acted upon professional advice is held to be a peculiar one, and strictly confined to the case of advice obtained from lawyers. *Beal v. Robeson*, 8 Ired. 276; *Olmstead v. Partridge*, 16 Gray, 381; *Straus v. Young*, 36 Md. 246. In the case first cited, the defendant, to rebut the plaintiff's allegation of malice, offered to prove that, before preferring the charge complained of, he had consulted with a certain justice of the peace, with whom he had been in the habit of advising on legal matters; and that he had followed his advice. The testimony was held inadmissible. "We have neither seen," said the court, "nor heard of any case where the opinion of an unprofessional man, taken by the defendant, has been admitted to show that he acted in good faith and without malice." And, after quoting the language of Story, J., in *Blunt v. Little*, 3 Mason, 102, to the effect that to admit the evidence even of counsel was going a great way, the court add concerning the rule: "We do not feel at liberty to carry it further by admitting testimony of the opinion of any gentleman, however respectable, who has not qualified himself for giving advice upon questions of law by studying it as a science, and pursuing it as a profession." See *Leigh v. Webb*, 3 Esp. 165; *Heyward v. Cuthbert*, 4 McCord, 354; *McNeely v. Driskill*, 3 Blackf. 259; *Bartlett v. Brown*, 6 R. I. 37, of magistrates issuing wrong warrants of their own motion, on a true statement of facts.

The difference between acting upon legal and non-legal advice appears very

clearly in respect of the defence of probable cause. The evidence of this is obviously stronger when asserted by a lawyer than when asserted by a layman. Indeed, it is so strong in the former case that the courts do not examine if it be a reasonable cause; the opinion of counsel is conclusive, so far as the defence based on it is concerned. If, therefore, the defendant answer that he acted *bona fide* upon legal advice, his defence is perfect. But if he should say that he had acted upon the advice of a discreet friend, it would be necessary to set forth fully the facts, so that the court might judge whether they constituted probable cause, precisely as he would have to do if he had acted without the advice of others, because one layman is as competent to judge of such a matter as another. It is clear, therefore, that such an averment of itself would be of no avail.

And it does not follow in every case that because a party makes a full and correct statement of a case, as he honestly believes, to his counsel, and receives and acts upon his advice, that his action is properly prosecuted; for he may, after the advice, and before the accusation, have been informed of facts which would satisfy a cautious man that the accused was not guilty. *Cole v. Curtis*, 16 Minn. 182.

That the mere abandonment of the prosecution and the acquittal of the defendant are not even *prima facie* evidence of a want of probable cause has often been decided. *Willans v. Taylor*, 6 Bing. 186; *Purcell v. McNamara*, 9 East, 361; *Wallis v. Alpine*, 1 Camp. 204, note; *Johnson v. Chambers*, 10 Ired. 287. So of an entry of *nolle pros.*: *Yocum v. Polly*, 1 B. Mon. 358; and of a dismissal for want of prosecution:

Purcell v. McNamara, *supra*; Braveboy v. Cockfield, 2 McMull. 270.

But the circumstances of the abandonment may be such as to constitute a *prima facie* case of want of probable cause, as in Willans v. Taylor, *supra*. There, it appeared, the defendant had presented two bills for perjury against the plaintiff, but did not himself appear before the grand jury; and the bills were ignored. He presented a third; and, on his own testimony, the bill was found. This prosecution he kept suspended for three years, when the plaintiff, taking the record down for trial, was acquitted; the defendant then declining to appear as a witness, though in court and called on. This was held *prima facie* evidence of want of probable cause. See also Nicholson v. Coghill, 4 Barn. & C. 21; Brown v. Randall, 36 Conn. 56.

So a voluntary discontinuance of a civil suit is *prima facie* evidence of want of probable cause. Nicholson v. Coghill, *supra*; Burhans v. Sanford, 19 Wend. 417; Cardinal v. Smith, 109 Mass. 158; Pierce v. Street, 3 Barn. & Ald. 397. Otherwise, of suffering a judgment for the defendant as in case of nonsuit, or a *non pros*. Burhans v. Sanford, *supra*; Sinclair v. Eldred, 4 Taunt. 7; Kirkpatrick v. Kirkpatrick, 39 Penn. St. 288; Driggs v. Burton, 44 Vt. 124.

A discharge of the plaintiff by a committing magistrate, authorized to commit or hold to bail upon circumstances warranting suspicion, is held *prima facie* evidence of the want of probable cause. Bostick v. Rutherford, 4 Hawks, 83; Johnson v. Chambers, 10 Ired. 287; Williams v. Norwood, 2 Yerg. 329; Josselyn v. McAllister, 25 Mich. 45. *Contra*, Israel v. Brooks, 23 Ill. 575. The converse is also held,

that a commitment of the plaintiff is *prima facie* evidence of probable cause. Graham v. Noble, 13 Serg. & R. 233; Braveboy v. Cockfield, 2 McMull. 270; Bacon v. Towne, 4 Cush. 217. So of the finding of the grand jury, notwithstanding the acquittal. Cardinal v. Smith, 109 Mass. 158.

The want of probable cause cannot be implied from proof of malice, however clear; for a person may prosecute a guilty person out of mere personal ill-will. Turner v. Ambler, 10 Q. B. 252, 257, Paterson, J.; Boyd v. Cross, 35 Md. 194; Mitchinson v. Cross, 58 Ill. 366.

These and many other cases show that the question whether the facts constitute reasonable and probable cause is for the court to decide.

Malice.—Malice may be inferred from the want of probable cause, though it is not a necessary deduction; and the question of its existence, unlike that of probable cause, is one of fact for the jury. Griffin v. Chubb, 7 Tex. 603. There is no presumption of malice in this action; the plaintiff must prove it. *Ib.*; Levy v. Brannan, 39 Cal. 485; Boyd v. Cross, 35 Md. 194; Dietz v. Langfitt, 63 Penn. 234; Merkle v. Ottensmeyer, 50 Mo. 49. But malice may be inferred from the activity and zeal displayed by the defendant in conducting the prosecution. Straus v. Young, 36 Md. 246.

It is not necessary to prove malice in the ordinary sense of the term: it is enough that any improper or sinister motive be shown. Stockley v. Hornidge, 8 Car. & P. 11; Jones v. Nicholls, 3 Moore & P. 12; Page v. Cushing, 38 Maine, 522; Barron v. Mason, 30 Vt. 189.

In Stockley v. Hornidge, *supra*, the court expressed the opinion, but with-

out directly deciding the point, that an action lies for maliciously arresting the plaintiff, and taking him in execution at the defendant's suit, though the plaintiff was taken in execution at the instance of the defendant's attorney, and without the knowledge or assent of the defendant. To the objection that there could be no evidence of malice in such a case, Best, C. J., said: "But malice may be inferred. Malice in law means an act done wrongfully, and without reasonable or probable cause, and not, as in common parlance, an act dictated by angry feeling or vindictive motives." But see *Burnaps v. Albert*, Taney, 244, holding the doctrine of *respondet superior* not to apply to such a case.

In *Page v. Cushing*, *supra*, the Supreme Court of Maine said that, "in a legal sense, malice has a meaning different from its popular signification. Acts wilfully and designedly done, which are unlawful, are malicious in respect to those to whom they are injurious. One may prosecute a laudable purpose with an honest intention, but in such a manner, and in such disregard of the rights of others, as to render his acts unlawful. Prosecutions may be instituted and pursued with pure motives to suppress crimes, but so regardless of established forms of law and of judicial proceedings as to render the transactions illegal and malicious. The general motive may be upright and commendable, while the particular acts in reference to others may be malicious in the legal acceptance of the term. So that an act may be malicious in a legal sense, which is not prompted or characterized by malevolence or corrupt design."

Damage.—Aside from the matters of malice and want of probable cause, the ground of this action for malicious

prosecution is "injury sustained by the plaintiff either in his person by imprisonment, his reputation by the scandal, or in his property by the expense. If the plaintiff cannot prove any such injury, he cannot maintain the action." *Selwyn's N. P.* 1026; *Savil v. Roberts*, 1 Salk. 13; *Jones v. Gwynn*, 10 Mod. 214.

If, therefore, the charge complained of be not scandalous, so that an action of slander could not be maintained for a similar verbal imputation, it is necessary for the plaintiff to aver and prove special damages, as was decided in the principal case, *Byne v. Moore*.

In *Frierson v. Hewitt*, 2 Hill (S. Car.), 499, an action for maliciously indicting the plaintiff for killing cattle, the court, by Mr. Justice O'Neill, after stating that the indictment had only charged a trespass, said: "The indictment must charge a crime; and then the action is sustainable *per se*, on showing a want of probable cause. . . . There is another class of cases which are popularly called actions for malicious prosecution, but they are misnamed; they are actions on the case in which both a *scienter* and a *per quod* must be laid and proved. I allude now, first, to actions for false and malicious prosecutions for a mere misdemeanor, involving no moral turpitude; secondly, to an abuse of judicial process, by procuring a man to be indicted as for a crime when it is a mere trespass; third, malicious search-warrants. In all these cases it will be perceived that they cannot be governed by the ordinary rules applicable to actions for malicious prosecutions. It is said by most of our law-writers that, in such cases, you must not only prove want of probable cause, but also express malice and actual injury or loss, as deprivation of

liberty, and money paid in defence. The express malice necessary to sustain such actions ought to be laid and proved; and this is what I understand by the *scienter*. As in an action for a false and malicious prosecution for a misdemeanor, it must be laid and proved that the party, knowing the defendant's innocence, still, of his mere malice, preferred the charge; so, in the second class of cases, it will not do to say that you indicted me as for a crime, for a trespass, without any probable cause; for, in such case, no injury is done to the plaintiff, and no fault is established against the defendant for which he can be punished. But when to this statement we superadd the facts that the defendant, knowing that the trespass complained of was no crime, yet procured the plaintiff to be indicted as for a crime; and if the plaintiff has sustained any injury, the action will lie. [See *Dennis v. Ryan*, 63 Barb. 146; *Streight v. Bell*, 37 Ind. 550.] There can be no necessary and consequential injury in such cases; it may or may not arise. In other words, there is no implied injury [as in the case of actionable words]; for there can be no slander, inasmuch as no crime is imputed. Actual injury must be stated and proved; and this constitutes the *per quod*. Deprivation of liberty, or expense of defence, will constitute sufficient ground to sustain this part of the action. According to these views, the plaintiff's action was not made out, and the nonsuit was properly ordered."

The editors of the *American Leading Cases*, p. 258 (5th ed.), also say that it is certainly only in the case of a crime, or, at least, an indictable offence, involving moral turpitude, the verbal imputation of which would be slander, that the mere preferring an in-

dictment, or issuing a warrant, or otherwise instituting a criminal proceeding, without arrest or special damage is actionable. And they suggest, as to what was said in *Gregory v. Derby*, 8 Car. & P. 749, to the effect that no action would lie for a charge of stealing, on which a warrant was issued, if the party was not apprehended; and the remark of the court in *O'Driscoll v. McBurney*, 2 Nott & M. 54, that there can be no prosecution without an arrest (see *Mayer v. Walter*, 64 Penn. St. 283, 289); that this should probably be confined to cases where the charge was not slanderous, or, at least, where arrest is specially made the *gravamen* in the declaration; "for," they say, "if a slanderous charge be made before a magistrate and a warrant demanded, and a warrant thereupon issue, it is believed that this form of action is the appropriate remedy. But if no warrant issue, the remedy is slander, in the form of 'imposing the crime of felony.'" See *Fuller v. Cook*, 3 Leon. 100; *Heyward v. Cuthbert*, 4 McCord, 354.

So, too, if the court issuing the warrant exceed its jurisdiction, or if the warrant or indictment be defective, the better opinion seems to be that an action for slander is the proper remedy if the charge were of a scandalous offence, and trespass if there were an arrest. 1 Amer. L. C. 259 (5th ed.); *Braveboy v. Cockfield*, 2 McMull. 270; *Turpin v. Remy*, 3 Blackf. 211; *Bodwell v. Osgood*, 3 Pick. 379. But see *Jones v. Gwynn*, 10 Mod. 214; *Wicks v. Fentham*, 4 T. R. 247; *Pippet v. Hearn*, 5 Barn. & Ald. 634; *Morris v. Scott*, 21 Wend. 281; *Shaul v. Brown*, 28 Iowa, 37.

There are, then, several distinct classes of cases commonly embraced under the head of malicious prosecu-

tion, which may be thus enumerated: 1. Where the declaration charges an indictment for an offence involving scandal, in which case it is necessary for the plaintiff to prove malice, want of probable cause, and the termination of the prosecution; 2. Where the indictment was for a misdemeanor or an offence not involving scandal, in which case the plaintiff must prove, in addition to the three facts just mentioned, special damage; 3. Where the action is for the malicious abuse of process, in which case the plaintiff need only prove malice and special damage; 4. Where the action is for the malicious issuance of a search-warrant, in which case it would seem that the plaintiff need only prove malice and want of probable cause, since the charge would involve scandal. See *Elsee v. Smith*, 1 Dowl. & R. 97; *Miller v. Brown*, 3 Mo. 127. And although, in general, an action cannot be maintained for preferring a false claim of title or of right to damages for an alleged injury, still it seems that if the claim be set up without the slightest foundation, to the defendant's certain knowledge, as if he should forge a promissory note, signing the plaintiff's name to it, and bring suit upon it against the plaintiff, an action in the nature of an action for malicious prosecution might be sustained. See *Green v. Button*, 2 Crompt., M. & R. 707; *Wren v. Weild*, Law R. 4 Q. B. 730, 735, so deciding of a claim not made in court. In such a case, however, it would seem that the plaintiff might declare either upon the analogy of *Pasley v. Freeman*, alleging a false charge, knowingly made, with intent to injure the plaintiff, followed by special damage, or in the form of malicious prosecution, alleging malice, want of probable cause, and damage. The latter was the

form in *Green v. Button* and *Wren v. Weild*, *supra*.

Malicious Abuse of Process.—The principal case, *Grainger v. Hill*, is an example of the action for a malicious abuse of process in compelling a party illegally to give up his property. Among other examples may be named the vexatious suing out of a second *capias*, pending a former writ, as in *Heywood v. Collinge*, 9 Ad. & E. 268; the levying of execution of double the amount of the debt, *Sommer v. Wilt*, 4 Serg. & R. 19; the fraudulent inducing a person to come within the jurisdiction of a court, *Wanzer v. Bright*, 52 Ill. 35; the arrest of the plaintiff on a *ca. sa.* for a larger sum than is due, *Jenings v. Florence*, 2 C. B. N. s. 467; and the wrongful suing out of an attachment, *Spengler v. Davy*, 15 Gratt. 381. In this case, it was held that an allegation of malice was necessary, but its omission was said to be cured by verdict. In *Stewart v. Cole*, 46 Ala. 646, it seems to have been supposed that proof of malice was unnecessary, except for the purpose of obtaining exemplary damages. But this is believed to be incorrect. It is difficult to see how the making a false charge, believing it to be true, can be actionable. The plaintiff's injury in such case is *damnum absque injuria*. See *Preston v. Cooper*, 1 Dill. 589; *Fullenwider v. McWilliams*, 7 Bush, 389.

It may be added that the old practice of making an allegation of conspiracy, where the action was brought against two or more, is now obsolete; and, if the allegation be inserted in the declaration, it may be rejected as surplusage. See *Parker v. Huntington*, 2 Gray, 124. However, all who voluntarily participate in the prosecution are liable. See *Stansbury v. Fogle*, 37 Md. 369.

CONSPIRACY.

HUTCHINS v. HUTCHINS, leading case.

Note on Conspiracy.

Historical aspects of the subject.

Modern doctrines.

HUTCHINS v. HUTCHINS.

(7 Hill, 104. Supreme Court, New York, January, 1845.)

Damage. The declaration alleged that the defendants, by fraudulently, maliciously, and wrongfully combining, confederating, and conspiring together, and, by fraud, deceit, and misrepresentation, had induced the father of the plaintiff to revoke a will, wherein he had devised certain real estate to the plaintiff. *Held*, that no cause of action was alleged.

THIS was an action for an alleged conspiracy by the defendants, whereby they had induced the plaintiff's father to revoke a will, in which certain real estate was devised to the plaintiff. The declaration alleged that the defendants, by fraudulently, maliciously, and wrongfully combining, confederating, and conspiring together, and by fraud, deceit, and misrepresentation, had induced the father of the plaintiff to revoke the said will.

Demurrer to the declaration.

S. Stevens, for the defendant. *F. M. Haight*, for the plaintiff.

The opinion of the court was delivered by

NELSON, C. J. The allegation of a conspiracy between the defendants, for the purpose and with the intent of committing the wrong complained of in the several counts of the declaration, is of no importance, so far as respects the cause and ground of the action. A simple conspiracy, however atrocious, unless it resulted in actual damage to the party, never was the subject of a civil action; not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use. Then, indeed, the allegation of a conspiracy was material and substantive, because, unless established by the proof, the plaintiff failed, as it was essential that the verdict should be against two at least in order to be upheld.

The writ of conspiracy, technically speaking, did not lie at

common law in any case, except where the conspiracy was to indict the party either of treason or felony, by which his life was in danger, and he had been acquitted of the indictment by verdict. All the other cases of conspiracy in the books were but actions on the case; and though it was usual to charge the conspiracy in the declaration, the averment was immaterial, and need not be proved. The action could always be brought against one defendant; or if brought against more, one might be found guilty and the rest acquitted. *Saville v. Roberts*, 1 *Ld. Raym.* 374; *s. c.* 12 *Mod.* 208; 1 *Salk.* 18; *Skinner v. Gunton*, 1 *Saund.* 228; *ib.* 230, note (4), and the cases there cited; *Jones v. Baker*, 7 *Cowen*, 445.

Where the action is brought against two or more as concerned in the wrong done, it is necessary, in order to recover against all of them, to prove a combination or joint act of all. For this purpose it may be important to establish the allegation of a conspiracy. But if it turn out on the trial that only one was concerned, the plaintiff may still recover, the same as if such one had been sued alone. The conspiracy or combination is nothing so far as sustaining the action goes, the foundation of it being the actual damage done to the party. In *Saville v. Roberts*, 1 *Ld. Raym.* 378, *Holt, C. J.*, said: "An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie. From whence it follows that the damage is the ground of the action, which is as great, in the present case, as if there had been a conspiracy." That was an action against one only, for maliciously procuring the plaintiff to be indicted of a riot, by reason whereof he was subjected to costs and expense in defending himself.

We may therefore lay out of consideration altogether the conspiracy charged against these defendants, in endeavoring to ascertain if any foundation is laid for the action, and regard it the same as if the defendant *Hutchins* had alone committed the several grievances for which redress is sought. The case would then be substantially this: The father of the plaintiff devised to him, in due form of law, a farm consisting of one hundred and fifty-one acres of land. The defendant, being aware of the fact, and intending to deprive the plaintiff of the benefit and advantage of the devise, and of his expected estate and interest in the farm, falsely and maliciously represented to the father, that, after

his decease, the plaintiff intended to set up a large demand against the estate, which would absorb the greater part of it, and thus deprive the other children of their just share; at the same time defaming and calumniating the character of the plaintiff in several particulars. By these fraudulent means the defendant prevailed upon the father to revoke and cancel the will, and to make and execute a new one, by which the plaintiff was excluded from all participation in his father's estate.

This is the substance of the case in its strongest aspect, as presented by the pleadings; and the question arises whether any actual damage, in contemplation of law, is shown to have been sustained by the plaintiff.

Fraud without damage, or damage without fraud, gives no cause of action, but, where both concur, an action lies. Damage, in the sense of the law, may arise out of injuries to the person or to the property; as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect. Thus, for injuries to his health, liberty, and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie.

Now, testing the plaintiff's declaration by these principles, has he made out a case from which it can be said that damage has resulted to him? I think not. In respect to the farm devised to him by the first will, he fails to show that he had any such interest in it as the law will recognize. The only foundation of his claim rests upon the mere unexecuted intention of his father to make a gift of the property; and this cannot be said to have conferred a right of any kind. To hold otherwise, and sanction the doctrine contended for by the plaintiff, would be next to saying that every voluntary courtesy was matter of legal obligation; that private thoughts and intentions, concerning benevolent or charitable distributions of property, might be seized upon as the foundation of a right which the law would deal with and protect.

I have not overlooked the causes referred to on the argument, of actions of slander, where special damage must be shown in order to make the words actionable, and where the deprivation of any present substantial advantage, even though gratuitous, such as the loss of customers, of a permanent home at a friend's, or advancement in life, and such like, if the immediate and direct consequence of the words, will sustain the action. 1 Starkie on Slander, 158-186, ed. of 1848. If this description of special damage is to be regarded as the gist and foundation of the action, I rather think the principle should be regarded as peculiar to that special injury. I am not aware of any class of remedies given for a violation of the rights of property, where so remote and contingent a damage has been allowed as a substantial ground of action.

But the law applicable to the case referred to proceeds upon the ground that the plaintiff, by the wrongful act complained of, has been deprived of the present actual enjoyment of some pecuniary advantages. No such damage can be pretended here. At best, the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the plaintiff; or the testator might change his mind or lose his property.

In short, the plaintiff had no interest in the property of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility, an interest which might, indeed, influence his hopes and expectations, but which is altogether too shadowy and evanescent to be dealt with by courts of law.

I am of opinion that the defendant is entitled to judgment.

Ordered accordingly.

Historical. — In the 21st year of Edw. 1, A.D. 1293, an act of Parliament was passed concerning conspirators, to the effect that those who desired to complain of such persons for procuring pleas to be maliciously moved against them should come before the justices appointed to hold the pleas of the king and give security to prosecute the complaint. The defendants were to be attached to appear upon a certain day, and justice was to be speedily done. If the defendants were convicted, they were to be severely punished, in the discretion of the judges. Or, the complainants, if they preferred, were to wait until the *Iter* of the justices, and then prosecute. 1 Rot. Parl. 96.

Seven years afterwards, in the Articles upon the Charters, 28 Edw. 1, c. 10 (1 St. at Large, 283), it was de-

clared, in regard to conspirators, false informers, and evil procurers of dozens, assizes, inquests, and juries, that the justices, when they went into the country to do their office, should, upon every plaint made to them, award inquests without writ and without delay, and "do right unto the plaintiffs."

About the same time, another statute was passed, declaring that whoever would complain of conspirators, inventors, and maintainers of false quarrels, and their abettors and supporters, should come to the chief justices of the king, and have a writ to attach such offenders to answer the parties aggrieved. And a writ, framed by Gilbert de Rouberie, was given by this act, which writ commanded the sheriff that if the plaintiff made him secure for prosecuting his complaint "*tunc pone per vadium et salvos plegios G. de C. quod sit coram nobis in Octobris sancti Johanne Baptistæ, ubicunque tunc fuerimus in Anglia, ad respondendum prædicto A. de placito conspirationis et transgressionis, secundum ordinationem nostram nuper inde provisam,*" &c. And it was added, that if any one was convicted, he should be imprisoned until he had made satisfaction to the plaintiff, and had paid a heavy fine to the king. 1 St. at Large, 399. From this it appears that this statute (which is classed among those of uncertain date) was subsequent to that of the 21 Edw. 1, and that the first act above mentioned was designed to afford an ample private remedy to the person aggrieved, as well as a public prosecution.

A few years later (33 Edw. 1, St. 1), an act was passed defining the term "conspirators" thus: "Conspirators be they that do consider or bind themselves by oath, covenant, or other alliance, that every of them shall aid and

support the enterprise of each other falsely and maliciously to indict, or cause to be indicted, or falsely to acquit people, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men with their liveries or fees for to maintain their malicious enterprises, and to suppress the truth, as well the takers as the givers; and stewards and bailiffs of great lords which, by their seignior, office, or power, undertake to maintain or support quarrels, pleas, or debates for other matters than such as touch the estates of their lords or themselves." There are also some later statutes concerning conspiracies, which need not be set forth. 4 Edw. 3, c. 10; 8 Hen. 6, c. 10; 18 Hen. 6, c. 12; 3 Hen. 7, c. 1.

These statutes are sometimes supposed to have given rise to the writs of conspiracy with which the old books so much abound. 1 Saund. 230, note. See also Parker v. Huntington, 2 Gray, 124. But this is probably a mistake. In Staundforde's P. C. p. 172, *Brief de Conspiracy*, in which the author treats of the civil as well as criminal aspects of the subject, it is said that "at common law this writ lay as well in the case of an acquittal upon appeal [of felony or murder] as it does at this day in the case of an acquittal upon indictment; but," the writer adds, "since the Statute of Westminster 2, c. 12 [*ante*, p. 191], it is a question whether the writ lies in the first case [appeal] or not." Fitzherbert speaks of the statute of Westminster 2, as taking away the right of action by writ of conspiracy in cases of acquittal by verdict upon appeal of felony or murder. Nat. Brev. 114. See Register, 134 b, part i. acc. But

see Staundf. P. C., *ut supra*; Pulton De Pace Regis, 232. Now this statute (which relates to malicious prosecutions) was passed in the 13th year of Edward 1, some eight years before the statute first above mentioned; which shows that actions of conspiracy were not first given by that act.

Coke also says that the act of 28 Edw. 1, c. 10 (Articles upon the Charters), was but in affirmance of the common law, both in its criminal and civil aspects. 2 Inst. 562, referring to the Register, and to Fitzherbert and Staundforde. (But the Register, it may be observed, is not conclusive, for much of the book is of quite modern date. And, besides, all the writs given there in full conclude upon the statute, *contra formam ordinationis in hujusmodi casu provisæ*. Register, 134, 134 b.) That conspiracies were the subject of criminal inquiry before the 21st year of Edw. 1, see 1 Nichols's Britton, 95, the date of which work is placed by Mr. Nichols in the 20th year of that reign. See Intro. p. xviii.

As to the nature of this old writ or action, Fitzherbert says that it lies where *two or more* persons, of malice and covin, conspire and devise to indict any person falsely, and the party is afterwards acquitted. But if *one* person, of malice and false imagination, cause another to be falsely indicted, the party so indicted shall not have the writ, but must bring an action on the case against the party. Nat. Brev. 114.

But this was only required, it seems, where the plaintiff had been appealed or indicted of crimes as distinguished from misdemeanors, or, as it was commonly expressed, of treason, felony, or murder; in other cases, this writ was allowed when the action was against but one. "A writ of conspiracy for indict-

ing for felony doth not lie but against two persons at the least; but a writ of conspiracy for indicting one of trespass or other falsity made lieth against one person." Ib. 116. And, therefore, where the writ was against several for a false indictment or appeal of felony, if all but one were acquitted, the action failed. Com. Dig. Action upon the Case for a Conspiracy, C. 1. But where the writ was brought against but one person, Fitzherbert says that it was only an action on the case for the falsity and deceit, "because one person cannot conspire with himself." Nat. Brev. 116.

The writ could be brought for deceit and trespass against several as well as against one, but it still remained in effect an action on the case. The allegation of conspiracy, however, was surplusage; and the result was that judgment could be obtained against one, while the writ as to the rest was dismissed. Muriel v. Tracy, 6 Mod. 169, per Lord Holt; Pollard v. Evans, 2 Show. 50; Skinner v. Gunton, 1 Saund. 228 and note, 230. It appears, indeed, from several of the old precedents, that it was usual in actions upon the case in the nature of conspiracy to insert in the declaration the words *per conspirationem inter eos*, if the action was against several, or *inter the defendant et quendam R.*, if the action was against but one. 2 Saund. 230, note; Winch's Entries, 104; Robinson's Entries, 104; Herne's Pleader, 147.

An accessory, upon the acquittal of his principal, was entitled to the writ equally with his principal. Fitzh. N. B. 115, giving the form of the writ.

Except where there was no such place in the county as that named in the indictment (see *infra*), the writ did not lie against indictors. Ib.; Register, 134 b. Though, *quare*, if the jurors pro-

cured themselves to be impanelled. *Ib.*; 2 Reeves's Hist. Eng. Law, 207, Finl. ed. So, if jurors were sworn to inquire, and afterwards one of them was discharged by the justices, he could not be punished for what he did when he was sworn; but if he conspired afterwards, he might be charged in a writ of conspiracy. *Ib.* So, one who came into court and discovered felonies, being sworn to give evidence to the jury, was protected. *Ib.* See 27 Edw. 3, p. 134, pl. 12; 27 Hen. 8, p. 2, pl. 5; 35 Hen. 8, p. 15.

If a man were indicted or appealed of treason or felony, or a trespass done in a foreign country, and were acquitted, he should have the writ of conspiracy against him who procured him to be indicted or appealed, and should recover treble damages, upon the St. 8 Hen. 6, c. 10. *Ib.*; 11 Hen. 7, 25 b. So, if a man were indicted of felony or treason where there was no such place in the county as that named, he could have the writ against the *indictors*, abettors, procurers, or conspirators, upon the St. 18 Hen. 6, c. 12. So, if the justices of jail-delivery arraigned a prisoner for murder within the year, where an appeal was depending against the same prisoner for the same murder, which they knew, and yet proceeded and acquitted him, he could have the writ, though he was not acquitted or discharged of the appeal. *Ib.*

The most interesting case, perhaps, was this: If a man were falsely indicted of felony, and afterwards, by act of Parliament, a general pardon were granted of all felonies, the party should *not* have a writ of conspiracy, though he should plead to the indictment and be acquitted, and would not plead the act; because his life was not in danger, and the felony was discharged by the act. *Ib.*

In order to show precisely the nature of this writ, we give the following forms from Fitzh. Nat. Brev. 115:—

Where the plaintiff was acquitted by verdict the writ was thus:—

“The king to the sheriff, &c. If A. shall make you secure, &c., then put, &c., B. and C. that they be before us, &c., to show wherefore, having before conspired together at N., they falsely and maliciously procured the aforesaid A. to be indicted of stealing, taking, and leading away a certain beast at N., and him to be taken upon that occasion and to be detained in our prison of Warwick, until in our court, before our beloved and faithful R. and S., our justices assigned to deliver our jail of Warwick, according to the law and custom of our realm, he was acquitted, to the great damage of him, the said A., and contrary to the form of the ordinance in such case provided. And have there the names of the pledges and this writ. Witness,” &c.

Where there was a nonsuit in appeal (without indictment) the writ was thus:—

Beginning as above. “Wherefore, having before had conspiracy between them at N., they falsely and maliciously procured the aforesaid A. to be appealed of the death of D., lately slain at E., and him, the said A., to be taken upon that occasion and to be detained in our prison of L., until in our court before us the same A., &c., by the consideration of our court, departed quitted thereof,” &c.

The form of the writ for one charged as an accessory was thus:—

“Wherefore, having before conspired together, &c., they falsely and maliciously procured the aforesaid A. to be indicted because he had abetted and procured D., who was the wife of E. F.

and G. to be appealed of the death of E. F., her late husband, before J. and his companions, lately our justices, to hear and determine that appeal, and him to be taken and imprisoned upon that occasion, and to be detained in our prison of Lincoln until he was acquitted thereof before our aforesaid justices, according to the law and custom of our realm," &c.

It will be observed that the substance of the writ was that the plaintiff had been falsely and maliciously appealed or indicted, and had been acquitted, or, in the case of an appeal without indictment, nonsuited. No allegation is made in any of the writs of "want of reasonable and probable cause." This allegation appears to be of modern origin. See *ante*, p. 195.

The old writ of conspiracy lay only in cases of false *trials* of the plaintiff, as appears from the statutes above mentioned, and from the absence of writs of this kind not founded upon the statutes. But it is not to be inferred that confederacies to injure a person in other ways were not actionable. There is a case in the Year-Books, 16 Edw. 2, p. 492, of the Prior of Coventry, who brought a writ of *trespass* — a distinct writ from the earliest times — against John de Nevill and many others, for a *confederacy* and riotous assembly, by which they beat him and his servants, and carried off his goods. It was objected, that the thing was an offence against the crown, so that the action belonged only to the king; but Herle, J., said that the plaintiff only mentioned the riot as matter to aggravate the fine to the king, and that he relied upon the trespass to himself, and for that he should recover damages. And though the king could pardon the fine, he could not the damages. See 2 Reeves's

Hist. Eng. Law, p. 160, note, Finl. ed.

We are therefore justified in inferring that actions for injuries from fraudulent combinations and conspiracies, whether by false prosecutions or otherwise, have been maintainable from the earliest times.

Modern Doctrines. — In modern times we have broken away from the old writ of conspiracy, as it was properly used, and it would no longer be considered as fatal to the plaintiff's case, in an action of conspiracy against several for falsely and maliciously indicting him of a felony, that all but one should be acquitted. The proceeding would doubtless be regarded as in substance an action for a malicious prosecution; and the plaintiff would be entitled to recover accordingly. *A fortiori*, if but one were sued for conspiracy. *Savile v. Roberts*, 1 Ld. Raym. 374; s. c. 12 Mod. 208; 1 Salk. 18. See note on Malicious Prosecution, *ante*, p. 191.

The effect of the principal case is, that the fact of conspiracy becomes actionable only when the act would be a ground of suit if done by a single person; and so it has been elsewhere held. *Kimball v. Harman*, 34 Md. 407. "It is clear," say the court in this case, "as well upon the authority of other cases as that of *Savile v. Roberts* [1 Ld. Raym. 374], that an act which, if done by one alone, constitutes no ground of an action on the case cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." For which the court cite the principal case and *Wellington v. Small*, 3 Cush. 145; *Adler v. Fenton*, 24 How. 407; *Cotterell v. Jones*, 11 Com. B. 713. And, *e converso*, if the act is unlawful when committed by one, it will be unlawful when

committed by a combination of several; as in the case of a conspiracy (carried out) for a malicious prosecution. *Dreux v. Domec*, 18 Cal. 83; *Swan v. Saddlemire*, 8 Wend. 676; *Griffith v. Ogle*, 1 Binn. 172; *Haldeman v. Martin*, 10 Penn. St. 369; *Davenport v. Lynch*, 6 Jones (N. Car.), 545; *Hinchman v. Richie*, Brightl. 143. Or a combination to entice a citizen of one State into the jurisdiction of another for the purpose of his arrest, though there be a cause of action against him. *Phelps v. Goddard*, 1 Tyler, 60. Or a combination to defraud. *Bulkley v. Storer*, 2 Day, 531; *Cowles v. Coe*, 21 Conn. 220; *Adams v. Paige*, 7 Pick. 542; *Talbot v. Cains*, 5 Met. 520; *Penrod v. Morrison*, 2 Penn. 126; *Whitman v. Spencer*, 2 R. I. 124; *Johnson v. Davis*, 7 Tex. 173; *Sheple v. Page*, 12 Vt. 519.

The conspiracy in itself, as was decided in the principal case, is not so unlawful as to be actionable. The action lies for *doing* the (or at least *some*) unlawful act, not for *conspiring* to do it. *Kimball v. Harman*, *supra*; *Castrique v. Behrens*, 30 L. J. Q. B. 163; *Kirkpatrick v. Lex*, 49 Penn. St. 122; *Parker v. Huntington*, 2 Gray, 124; *Herron v. Hughes*, 25 Cal. 555; *Hall v. Eaton*, 25 Vt. 458; *Eason v. Petway*, 1 Dev. & B. 44; *Bowen v. Matheson*, 14 Allen, 499. But if any damage is sustained in consequence of the conspiracy, an action lies though the act designed was not committed. *Patten v. Gurney*, 17 Mass. 186. In the case of *Swan v. Saddlemire*, 8 Wend. 676, it is said to be sufficient that the defendants' act has caused trouble, inconvenience, or expense. In cases where the act is actionable *per se*, as in libel and certain cases of slander, it is not necessary, of course, to prove any special damage. *Hood v. Palm*, 8 Barr, 237.

In *Parker v. Huntington*, 2 Gray, 124, the plaintiff declared against the defendants for maliciously conspiring to have him indicted for perjury; and there was a demurrer, on the ground that the declaration did not set out any agreement to do an unlawful act, or a lawful act by unlawful means. The demurrer was overruled; and the court said that as the action was not for a malicious prosecution for treason or for a capital felony, it was in no sense an action for conspiracy. It was simply an action on the case, and the charge of conspiracy was mere surplusage, intended as matter of aggravation.

In some cases, however, the allegation of a conspiracy to injure the plaintiff, when followed by actual injury, becomes important; as where the injury in itself is one for which the law gives no redress. Thus, in *Burton v. Fulton*, 49 Penn. St. 151, the plaintiff sued the defendants as directors of a school board for maliciously conspiring to secure her removal from the position of teacher in one of their schools; and it was held that inasmuch as the defendants had the power of removal, the injury which may have resulted to the plaintiff from their action was not a ground of civil redress without proof of actual malice. See also *Wellington v. Small*, 3 Cush. 145; *Leavitt v. Gushee*, 5 Cal. 152; *Newall v. Jenkins*, 26 Penn. St. 159; *Johnson v. Davis*, 7 Tex. 173; *Gaunce v. Backhouse*, 37 Penn. St. 350; *Hinchman v. Richie*, Brightl. 143.

In cases of this kind, where the fact of conspiracy is essential (in order to show the unlawfulness of the act and injury complained of) to the plaintiff's case, it is necessary, of course, to prove an actual combination or participation. See *Gaunce v. Backhouse*, 37 Penn. St. 350; *Benford v. Sanner*, 40 Penn. St. 9.

It is not, however, necessary to prove an actual participation in the act in every case. See *Page v. Parker*, 43 N. H. 363, 367, where the court say that if the jury found that Reding (one of the defendants), with the other two, had combined and conspired to effect a common object, and it was arranged that each should do certain acts and perform certain parts, with a view to the attainment of the common result, or that one or two were to be the active agents while the other one or two remained in the background and took no open or visible part in the transaction, they would still all be alike liable for the acts of all or either of them. So, too, in *Tappan v. Powers*, 2 Hall, 277, it was held, on demurrer to the plaintiff's declaration, that whatever is done in pursuance of a fraudulent combination by any of the parties concerned in it may be averred to be the act of all. In *Livermore v. Herschell*, 3 Pick. 33, it was held in an action on the case in the nature of conspiracy against three for obtaining goods upon credit by false and fraudulent representations, evidence that the representations were made by one alone in pursuance of a previous

agreement and confederacy with the other two, though in their absence, would sustain the declaration charging the three with the wrong. See also *Bredin v. Bredin*, 3 Barr, 81; *Hinchman v. Richie*, Brightl. 143.

But if as to one of the defendants there be no collusion or participation in the scheme or in its execution, he cannot be found guilty by evidence of mere silent observation and approval of the act. *Brannock v. Bouldin*, 4 Ired. 61. See *Johuson v. Davis*, 7 Tex. 173.

It has been supposed that since husband and wife are in law but one person, the charge of conspiracy cannot be sustained against them *alone*. *Kirtley v. Deck*, 2 Munf. 10, 15. But this was upon the authority of *Fitzh. Nat. Brev.* 116, which, as we have seen, treats mainly of the ancient writ of conspiracy; and this rule is there spoken of as applying to the case of a writ of conspiracy for indicting the plaintiff of felony. In cases of trespass, an action for a false and malicious prosecution would clearly lie against husband and wife, though alleged to have been *per conspirationem*, &c.

ASSAULT AND BATTERY.

STEPHENS v. MYERS, leading case.

COLE v. TURNER, leading case.

ELLIOTT v. BROWN, leading case.

Note on Assault and Battery.

Historical aspects of the subject.

Assault.

Battery.

Son assault demeene.

Master and servant.

STEPHENS v. MYERS.

(4 Car. & P. 349. Common Pleas, England, *Nisi Prius*, Trinity Term, 1880.)

Assault. A. was advancing in a threatening attitude, with an intention to strike B., so that his blow would have immediately reached B. if he had not been stopped.
Held, an assault, though at the particular moment when A. was stopped he was not near enough for his blow to take effect.

ASSAULT. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea, not guilty.

It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being six or seven persons between him and the plaintiff. The defendant, in the course of some angry discussion which took place, having been very vociferous, and having interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched toward the chairman, but was stopped by the church-warden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to reach the plaintiff; but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman.

Spankie, Serjt., for the defendant, upon this evidence con-

tended that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat. There was not a present ability; he had not the means of executing his intention at the time he was stopped.

TINDAL, C. J., in his summing up, said: It is not every threat, when there is no actual personal violence, that constitutes an assault; there must in all cases be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped. Then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise, you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff. Damages 1s.

COLE v. TURNER.

(6 Mod. 149; s. c. Holt, 106. King's Bench, England, *Nisi Prius*, Easter Term, 1706.)

Battery. To touch another in anger, though in the slightest degree, or under pretence of passing by, is in law a battery.

HOLT, C. J., upon evidence in trespass for assault and battery, declared,

First, that the least touching of another in anger is a battery.

Secondly, if two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery.

Thirdly, if any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to such degree as may do hurt will be a battery.

ELLIOTT v. BROWN.

(2 Wend. 497. Supreme Court, New York, May, 1829.)

Son Assault Demesne. The party first attacked, in a personal *rencontre* between two individuals, is not entitled to maintain an action for an assault and battery, if he uses so much personal violence towards the other party, exceeding the bounds of self-defence, as could not be justified under a plea of *son assault demesne*, were he the party defendant in a suit.

ERROR from the New York Common Pleas. Brown sued Elliott in an action of an assault and battery. The defendant pleaded not guilty, and subjoined a notice of *son assault demesne*. On the trial of the cause, the plaintiff proved that the defendant struck him in the face, or put his fist in his face; upon which, as it appeared by the evidence on the part of the defendant, the plaintiff threw the defendant down on the pavement with violence, and when he arose again clenched him and threw him down, his head striking the curb-stone; his head was badly cut, and bled; he was greatly hurt and bruised, and was confined to his room for sixteen or seventeen days, and was attended by a physician, who testified that he found him very ill on the night he received the injury, that he was laboring under a concussion of the brain, and a wound in his head, which was bleeding. It appeared that the plaintiff was a very large and powerful man, and that the defendant was a small elderly man, and that it was with difficulty the former was torn from the latter when lying on the ground. The testimony was conflicting as to the fact whether the defendant struck the first blow.

The judge charged the jury that they must determine who commenced the affray by committing the first personal violence; that the defendant had been much hurt, but yet the inquiry must be, who committed the first act of violence; and if they found that it was the defendant, their verdict must be for the plaintiff; but that in such case the injuries sustained by the defendant ought to be considered in mitigation of damages. The counsel for the defendant insisted that the judge should charge the jury, that, though they should believe that the defendant had put his fist in the plaintiff's face, yet if the plaintiff provoked it, and followed it up by unnecessary violence, he

became a trespasser, and the defendant would stand justified ; to which the judge replied, that if one man commences an assault upon another, and he in defending himself does violence to the person assaulting him, not necessary to his own defence, he thereby gives a cause of action for such violence on his part, yet he loses not his own cause of action, which accrued to him from the first assault and battery which had been committed on him ; to which opinion the defendant excepted.

The jury, after having retired, came into court and requested to be instructed what amount of damages would carry costs. The judge told them their inquiry ought to be, whether or not an assault and battery had been committed by the defendant upon the plaintiff; if they found that it had not been committed, their verdict should be for the defendant, otherwise for the plaintiff, to whom they should award such damages as the wrong required, without reference to the costs ; that it was his duty to give them all proper information in matters of law necessary to aid them in the illustration or determination of the facts before them, but that the information sought was not necessary for that purpose. The counsel for the defendant again excepted.

D. Graham, for plaintiff in error. *J. Edwards*, for defendant.

By the court, SAVAGE, C. J. The first question is an important one, and it is rather strange that no case is to be found, as far as my researches have extended, where the point has been adjudicated. It has been decided by this court, though I cannot find the decision reported, that there cannot be a recovery by both parties in cross-actions. The party who first recovers may plead that recovery in the suit against himself for the same affray. Had the parties been reversed in this case, upon the same testimony which was given, the court would no doubt have charged the jury, that although Elliott might have committed the first assault, yet if Brown used more violence than was necessary to his own defence he became a trespasser, and was liable to pay damages to the plaintiff. Such unquestionably is the law. It was so laid down by Holt, C. J., in *Cockcroft v. Smith*, Salk. 642, where he says, " That for every assault he did not think it reasonable a man should be banged with a cudgel ; that the meaning of the plea (son assault demesne) was, that he struck in his own defence." The facts of the case are not given, but from what appears in 1 Ld. Raym. 177, it was an action for

mayhem, in biting off the plaintiff's finger, and the first assault by the plaintiff was tilting the form on which the defendant sat, whereby the defendant fell; or, according to 11 Mod. 43, in a scuffle the plaintiff ran his finger towards the defendant's eyes, whereupon the defendant bit off a joint. It was held in that case a good defence. But the principle is laid down by the court, though they say, contrary to common practice, that for a small assault there must not be an unequal return; but the question should be, what was necessary for a man's defence, not who struck first. This case of *Cockcroft v. Smith* is referred to by all subsequent writers.

The same principle was recognized in South Carolina, in the case of *The State v. Wood*, 1 Bay, 351. The defendant was indicted for an assault and battery on a woman. He proved that she struck him first with a cowskin, whereupon he gave her several severe blows with a large stick, and left her speechless on the ground. The court directed a verdict against the defendant. They agreed that the general rule of law is, that it is a justification to the defendant that the prosecutor or plaintiff gives the first blow; but the resistance ought to be in proportion to the injury offered. Where a man disarms the aggressor, or puts it out of his power to do further injury, he ought to desist from further violence; and if he commits any further outrage, he becomes the aggressor. The case in *Salk*. 642, is cited as sound law. So the master of a vessel has a right to use proper chastisement for disobedience of orders; but if it be excessive and out of proportion to the offence, he becomes a trespasser. 15 Mass. R. 347, 365. And so in all cases where the right of chastisement is given by law, if unnecessary severity is used, an action or an indictment lies. The plaintiff in this case had no greater rights than those who are permitted by law to chastise others under their control. Admitting that the defendant gave the first blow, this authorized the plaintiff to resist force by force, and to disarm or disable his adversary; but it did not authorize an athletic, gigantic man to crush almost to death a little, feeble old man. There can be no manner of doubt, then, that had Elliott sued Brown, he would have been entitled to recover exemplary damages; and from former decisions, should this recovery be sustained, it is a bar to any action which Elliott may bring. Can the law tolerate such injustice? How can the plaintiff be in

any better situation in the eye of the law and of reason by being plaintiff, than he would be in were he the defendant? If the law is as stated in the court below, any person who is assaulted ever so slightly, and that too upon his own provocation, may turn upon his assailant and beat him as much as he pleases without killing him, and yet recover damages from the man whom he has thus abused. The law is not chargeable with such injustice. It is true that both parties may be guilty of a breach of the peace, and may be liable to punishment by indictment at the suit of the people, whose laws they have both offended; but a civil action cannot surely be sustained by each of them against the other. The judge should have told the jury, that although the defendant might have given the first blow, yet if the plaintiff had used not only more force than was necessary for self-defence, but had unnecessarily abused the defendant, that then he was not entitled to recover damages; but was liable to pay damages, should Elliott prosecute him.

Historical. — Actions for assault and battery have passed through three stages. At first they were of a civil nature only; afterwards they were both civil and criminal (probably) at the same time; and finally they became subjects of separate civil and criminal jurisdiction.

The first condition prevailed in the Anglo-Saxon period, as probably among all the early Germanic races. It was so among the Salian Franks, as the Salic law shows. See *Lex Salica*, c. 17; *Laws of Æthelbirght*, of Alfred, and of William the Conqueror, 1 Thorpe's *Ancient Laws and Inst.* pp. 1-21, 95-101, 471-473.

The existence of the second stage is a matter of probability rather than certainty. It is the natural link between the first and third stages.

By the time of Bracton, the third stage was reached.

A purely criminal proceeding was now developed for the punishment of

batteries, — in the name of the king. This was either by indictment or by appeal of felony. But the latter mode of prosecution, which had been the ancient proceeding, could still be used as a civil remedy by omitting the word "feloniously" from the charge; otherwise the appeal belonged to the king alone. Bracton, 154 b, § 3; Horne's *Mirror*, p. 92. Or the writ of trespass could, it seems, be used. See *infra*.

In the time of Edward the First, the same forms of redress were given to the injured party; but it was said that, for avoiding the perilous risk of battle, it was better to proceed by writ of trespass than by appeal. If the latter redress were employed, the plaintiff himself ran the risk of imprisonment, and of being compelled to make satisfaction to the defendant in case there was a variance between the appeal as entered in the roll of the coroner and as set forth in the county court, or if there was any omission or interruption

or any error in the latter court. If the appeal were maintained, and the defendant put himself upon the country and was found guilty, the strict law was that he should suffer the same punishment as if he had chosen the trial by battle and been vanquished, "to wit, wound for wound, imprisonment for imprisonment, and trespass for trespass." But this severity was so far mitigated in practice that the defendant was sent to prison, there to remain in irons until satisfaction was made to the plaintiff. 1 Nichols's Britton, pp. 123, 124. This, however, was not a bar to a proceeding by the king for a breach of his peace. *Ib.* p. 124.

The judgment imposed in the proceeding by trespass was the same as the (mitigated?) judgment in an appeal; except where the trespass was committed in time of peace (*i.e.*, not at jousts, tournaments, and such like contests) against knights or other honorable persons by ribalds or other worthless people, in which case the hand that had struck the party was to be cut off. *Ib.*

The appeal of wounds and mayhem was as follows: "A. appellat B. quod cum esset in pace domini regis tali loco, tali die, tali hora, tali anno, etc.; venit idem B. cum vi sua [et in felonia] et assultu premedito, etc., fecit ei quandam plagam in capite, vel in brachio, vel in alio loco corporis, ita quod mahematus est. Et quod hoc fecit nequiter [et in felonia], offert disrationare versus eum, sicut homo mahematus, prout curia domini regis consideraverit." Bracton, 144 b.

The following is given in the Mirror as the form of an appeal of wounding: "Barnings here appealeth Olif there, that whereas the said Barnings, &c., the said Olif with such a weapon struck him, and wounded him in such

a part of his body, which wound contained so much in length, so much in breadth, and so much in depth; and this wound he gave him feloniously." Ch. 2, § 20.

No mention is made in Bracton or the Mirror, so far as we can discover, of mere assaults without battery. But in the reign of Edward the Third, assaults began to be considered as distinct causes of action. 22 Lib. Ass. 60; 40 Lib. Ass. 40. See 2 Reeves's Hist. Eng. Law, 392, Finl. ed.

The first writ of trespass given in the Register is for an assault and battery. Fitzherbert gives the same writ, translating it thus: "The King to the Sheriff of Lincolnshire, greeting: W. of B. hath complained unto us that C. made an assault upon him, the said W., at N., and beat, wounded, and ill-treated him, and other enormous things to him did, to the no small damage and grievance of him, the said W. And therefore we command you that you hear that plaint, and afterwards justly cause him to be thereupon brought before you, that we may hear no more clamor thereupon for want of justice. Witness," &c. N. B. 85; Register, 92.

This, it will be observed, was a writ of *justicies*, commanding the sheriff himself to hear and determine the cause; and the Register adds, "Nota quod non debet dici *vi et armis* vulneravit, neque contra pacem nostram; quia vicecomes (the sheriff) non potest terminare ea."

If, however, the writ was returnable before the king's court, it contained the words *vi et armis*, and was abatable without them. The writ then ran: "The King to the Sheriff, &c. If A. shall make you secure, then put, &c., B. that he be before us or our justices at Westminster, &c., to show wherefore, *with force and arms*, he made an assault, &c., and beat, wounded, and ill-treated,"

&c. Fitzh. N. B. 86. See further, Register (Original Writs), 93, 94 b, 102, 106. These writs were evidently in use in the time of Bracton, for he uses the same descriptive terms in speaking of the injury. The action therefore antedated the statute authorizing actions on the case (13 Edw. 1, c. 24); and it has come down to the present time without any essential change in form. The usual allegation still is, as it was when Bracton wrote, that the defendant made an assault upon the plaintiff, and beat, wounded, and ill-treated him.

Actions for the beating of servants were also maintainable in these early times; but the law was peculiar. In the time of Bracton (Henry 3), a master could bring an action for the insult and disgrace inflicted upon him in the person of his servant or slave, though no loss of service followed; and though the servant himself withdrew from his action, or refused to prosecute. Bracton, 115. But for the mere wounds inflicted, the servant alone had a right of action. Ib. 155 b.

In the following reign the law was somewhat different. "If the plaintiff complains," says Britton, "of a damage done to himself and to his men, or only on behalf of his men, the defendant may say that every man has a separate action; and in such cases we will that the plaintiffs recover nothing by their complaints beyond the damages which they can reasonably show they have sustained by the loss of the services of their men who have been beaten or imprisoned, or so treated as to be incapable of service. And their action shall not be brought until after conviction of the trespass committed against the servants." 1 Nichols's Britton, p. 131.

We have here, as in Bracton, the very distinction which now prevails

between the injury by loss of service, redress for which belongs to the master, and the personal injury of the battery, for which the servant alone can sue; but why the servant's action in Britton's day must have preceded does not appear, nor does it appear when the change back to the law of Bracton took place. But according to Bracton, if the slave or servant upon whom violence had been inflicted, sued first and failed in his proof, the master lost his right of action, on the ground that the latter right was dependent upon the existence of an injury inflicted upon the slave, and this had been disproved; "*quia si factum non probetur quod est principale, valere non debeat aliquid quod dependeat ex eo, et proinde quod talis non verberatur ad dedecus ipsius, nec ad damnum.*" Book 3, c. 12, § 6, p. 115. At the present time, a judgment against the servant in such case would, of course, be inadmissible in evidence in an action by the master, as being *res inter alios*.

The principle stated by Bracton of the master's right to sue for an insult done to him through the person of his slave or servant was evidently derived from the Roman law. Gaius says, "Now we appear to suffer injury not only in our own person, but also in the persons of our children, whom we have under the *poteslas*, and in the persons of our wives, although they may not be in our *manus*. . . . But on the slave himself no injury seems to be inflicted, for it was regarded as done to the master through him. Yet in this case we do not seem to suffer an injury in the same manner as in the persons of our children or our wives, but then only when something more shameful has been done, which appears manifestly to be intended as an *insult* to the master of the slave." Book 3, §§ 221, 222,

p. 578, Tompkins & Lemon's ed.; Inst. Just. book 4, tit. 4, §§ 2, 3.

It is interesting to observe that a slave was not held to be in the same absolute subjection to his master under the English law as under the Roman. Bracton, though drawing his doctrines directly and almost literally from the latter source, changes the statement when he comes to speak of the rights of the slave, saying that the slave himself sued for wounds and blows, and not the master (except when the injuries were inflicted to insult him); "*habent enim servi personam standi in iudicio contra omnes de injuriis sibi factis contra pacem domini regis.*" And he adds, "*multo fortius servientes.*" Bracton further says that slaves had a right to come into court even against their masters in cases of sedition against the king, and for other things done against the king's peace. 155 b.

So, too, under the Roman law, if the injury was done to a freeman employed in the service of another, the latter could sue if the injury was intended as a mere insult to him; otherwise, the person upon whom the act was done could alone maintain an action. Inst. Just. book 4, tit. 4, § 6. As to the modern doctrines concerning master and servant in cases of assault and battery, see *post*, p. 282.

Bracton, transcribing the provisions of Justinian, says that the punishment is sometimes light and sometimes heavy, and its severity depends (1) upon the character of the deed itself, as where a man is severely wounded, beaten, and ill-treated; (2) upon the place where the injury is done, as in the court of the king, or of the lords, or before the justices, or in the county before the sheriff, or in the theatre, or elsewhere before all the people;

(3) upon the locality of the wound, as in the forehead or eye, rather than in a place covered; (4) upon the person on whom it is committed, as upon magistrates, officers, parents, or patrons. 155 b; Inst. Just. book 4, tit. 4, § 9. See also Fleta, p. 68. Bracton adds that not only the person who directly did the act is liable, but he also who accomplished it by fraud or procured it so to be done. *Ib.* The action, he says, was extinguished if the party dissembled his injury; and one who took no notice of the wrong at the time, could not afterwards change his mind and bring an action. *Ib.*; Inst. Just. book 4, tit. 4, § 12. According to the Digest, if the person injured did not take steps for redress within a year his right of action was gone, though he expressed indignation at the time it was committed. Dig. lib. 47, tit. 10, 17, § 6.

It would be interesting to know whether these doctrines concerning the amount of damages ever received a practical recognition in the courts of England; and if they did, how and when they became obsolete as points of law. The truth probably is, that they have always received a practical recognition from the *juries*, and that the courts would not discountenance an award of damages according to some such very natural standard.

In Pulton De Pace Regis, 2 b, a work of the beginning of the seventeenth century, we find the following definitions and statements of the law, drawn from the cases of the Year-Books: "Menaces, assaults, and batteries be things of several natures, and yet for the most part they tend to one effect, viz., to hurt him against whom they are bent. Menacing is a threatening of some hurt to be done or procured by

the speaker, or some other by his means, to the person of the hearer, or his wife, servant, tenant, or other, whereby he receiveth loss or hurt. Assault is an attempt to execute the thing menaced by force and violence. Battery is the performing of the thing before threatened, viz., the beating of him that was first menaced and then assaulted. Menacing beginneth the quarrel, assaulting doth increase it, and battery accomplisheth it." Menacing, whereby a person was restrained from pursuing the law, was a criminal offence, subjecting the party to arrest and imprisonment. St. 2 Edw. 3, c. 30.

The author (who begins his book with the subject of menaces, as the "very root and principal cause" of breaches of the peace) then proceeds to say that the law hath given and provided for him who is only menaced an action of trespass, whereby he shall recover his damages (40 Edw. 3, p. 40); so that (*i.e.*, provided that) the same menacing do tend to the hurt of him who was menaced, his servant, tenant, or any other person by whom he liveth or receiveth benefit. And therefore the plaintiff in an action of menace may declare: That he is an attorney, and that in respect of the defendant's menace, he durst not attend his client's suits from such a day until such a day; or that he is a husbandman, and could not attend or oversee his husbandry; or that he is a bailiff, or collector of rents, and could not, in respect of such menace, by the space of many months, attend his bailiwick, collection of rents, or other businesses (37 Hen. 6, p. 2); or that in regard of such menacing he was not able to nor durst travel, to apply his trade or get his living without such force and defence as his estate

was not able to maintain. 30 Lib. Ass. pl. 14.

The collector of a fifteen accordingly brought an action of trespass for the king and himself, and declared that the defendant did so rebuke him that he durst not tarry in the town to gather up the fifteen, for fear that the defendant would have beaten him; and though the defendant did not beat him, yet this rebuke was adjudged an assault, and the plaintiff recovered damages. 27 Lib. Ass. pl. 11.

And upon the authority of Liber Intrationum, 592, and 22 Lib. Ass. pl. 76, and 20 Hen. 7, p. 5, Pulton says of menaces of servants, that if one man do menace or threaten the servant of another of life, or member, so that the servant depart from his master, whereby the master for a time loses the service of his said servant, the master shall have an action of trespass against him that did so menace his servant, declaring that he made assault upon his servant, did beat him, wound him, and evil entreat him, and so often menaced to kill and dismember him, and did him so many injuries and wrongs, that his said servant durst not for such menaces, and for fear of being killed or maimed, attend his business (*viz.*, the bailiwick of his husbandry, his service in husbandry, or keeping of his beasts, horses, sheep, &c.). And so his said business and service lay undone, and the said plaintiff lost the service of his said servant from such a day to such a day then next following, to his great damage, and against the king's peace, whereof he complaineth that he is endamaged 20*l*. To which Pulton adds, "And so note, that a man shall not have an action of trespass for menace only, unless he hath thereby some other loss or hurt; for the menace and the hurt which the

party doth sustain thereby do make the trespass, and do give cause of the action of trespass. But it is otherwise if a man beat the wife or villain of another, for in those cases the party wronged, viz., the husband or lord, shall have an action of trespass, though he have received no loss nor hindrance in commodity. For he may join in suit with his wife to recover recompense for the battery and wrong done unto her by the trespasser; and also he may punish him by action of trespass who beateth his villain, as he may him who beateth his horse, cow," &c. No authority, however, is cited for this opinion; and that concerning the battery of the plaintiff's villain, it will be observed, is contrary to Britton and Bracton, unless the battery was done in disgrace of the master. And if that were ground of action for the master at this time (which is very doubtful, since no mention is made of such a thing), the fact indicates a retrograde doctrine since the time of Britton.

Cases are also referred to as holding that menaces of tenants (at will, paying rent), whereby they were caused to depart, afforded ground for an action of trespass. Liber Intr. 592; 20 Hen. 7, p. 5; 9 Hen. 7, p. 7.

A mere menace, however, though followed by loss, was not actionable unless it was a threat of life or limb, or breach of the peace. Pulton De Pace Regis, 3 b, 5. As if a man die seised of certain lands, and a stranger will abate, and then the heir of him who died seised will enter upon the stranger and menace and threaten him that if he will not depart from the possession of the same land, then he shall repent it, as the law will allow; this is menace justifiable, for that he hath said no more than the law will allow him to perform.

Ib.; 22 Hen. 6, p. 48; 21 Hen. 6, p. 26; Hen. 7, p. 7.

But in trespass for assault and battery, says Pulton, where it is found that the offender did make an assault only (as where one did strike at another with a hatchet), but did make no battery, or hurt the person of any other, it is otherwise (22 Lib. Ass. pl. 60; 42 Edw. 3, p. 7; 40 Edw. 3, p. 40; 6 Hen. 7, p. 1). For, he says, seeing assaulting doth tend to the breach of the peace, and he that maketh an assault doth his endeavor to hurt, the law doth give to him that is assaulted an action of trespass to recover his damages, and to the king a fine.

The plea of son assault demesne was a good defence in the old law, as it is now. "In that case [where the attack was made by the plaintiff] the defendant doth answer the plaintiff's declaration, and pleadeth in bar that the plaintiff did assault him, and would have beaten him, and he defended himself, and the hurt which the plaintiff received was by his own assault." Pult. P. R. 5 b. If issue was joined upon the plea and the defendant found guilty, he was to pay damages to the plaintiff and a fine to the king; "for at all times in an action of trespass *vi et armis* brought against any person, if the defendant be convict, he shall pay a fine to the king." Ib. But if the issue was found for the defendant, the plaintiff was amerced to the king for his false suit, and the defendant paid neither damages nor fine, notwithstanding the blows inflicted upon the plaintiff. Ib.

The defendant could also justify a battery by alleging that it was done in defence of the party's wife, or husband, or parent, or child (19 Hen. 6, pp. 31, 65; Liber Intr. 553, 554); or, in the case of a servant, that it was done in defence

of his master (36 Hen. 6, p. 51; 11 Hen. 6, p. 19; 12 Edw. 4, p. 6); or, in the case of a *lord*, that the battery was done in defence of his *villain*. But a servant could not justify for a battery done to the father, mother, brother, sister, son, or daughter of his master, because he owed no duty or obedience to them. *Ib.*; 21 Hen. 8, p. 39; 9 Edw. 4, p. 48. Nor could a mere *master* justify the beating of one who assaulted his *servant*. "But," says Pulton, "though the master cannot assault and beat another that doth assault, and would beat, wound, or otherwise evil entreat his servant, yet he may with a sword, staff, or other weapon, aid and defend his servant assaulted from being beaten, and that in respect of the loss of his service. 19 Hen. 6, pp. 80, 66; 22 Hen. 6, p. 43; 21 Hen. 6, p. 9. [See *infra*, p. 233.] And also after his servant is beaten, he may have an action of trespass against him that did beat, wound, or evil entreat his said servant (unless it were upon the same servant's own assault), and recover so much damages against the offender as he received prejudice or hindrance by the loss of his said servant's service; for if the servant be but so beaten that he is able to do his service as well as he was before, the master shall recover no damages for that beating. And as the master may have an action of trespass against the offender, and recover so much in damages as he doth lose by the want of his said servant's service; so likewise the same servant may have another action of trespass against the offender, and recover so much in damages as he shall receive hurt on his body by the said assault and beating." *Ib.* And in action by a master for the battery of his servant, "he need not declare of the *retainer* of the same servant, for if he did but serve his master

at his pleasure, yet the master shall have an action of trespass for the loss of his service." *Ib.*; 22 Hen. 6, p. 43.

Among the other justifications allowed the defendant in the time of the Year-Books were the following: that the battery was committed in the defence of the party's own goods (9 Edw. 4, p. 28; 19 Hen. 6, pp. 31, 65), or of goods which were put into his possession as bailee (*Liber Intr.* 553), or in defence of his land or way. Pulton *De Pace Regis*, 6 *b.* Under the last-named defence, the following case is given: If one hath a mill whereunto a river or spring of water doth run, and hath run time out of the remembrance of man, and another would stop the course of that water and turn it another way, and the owner of the mill doth disturb him therein, whereupon that other doth assault and attempt to beat him; in this case, if the owner of the mill, for his own safeguard and for the defence of his own watercourse, doth beat him again, it is justifiable. *Ib.*; 3 Hen. 4, p. 9. So, too, a justice of the peace could justify that the plaintiff was beaten while resisting an arrest. So one could justify that he was a school-master, and the plaintiff a scholar who was negligent in his books, or that he had beaten and abused his school-fellows. Or, the defendant could say that the plaintiff was his apprentice, and was negligent in learning his trade; or that the plaintiff was frantic, furious, or mad, and was attempting to burn a house, or to do some other mischief, or to hurt himself or others, in which case it was lawful for the parents, kinsmen, and other friends to take the plaintiff, put him into a house, and bind him, and beat him with rods, and to do any other forcible act to reclaim him, or to keep him in a house or place alone where he

should do no hurt. *Ib.* p. 7; 22 *Lib. Ass.* pl. 56; 22 *Edw.* 4, p. 45.

As to the right of a master to beat his servant, upon which point there has been some question in modern times (*Smith, Master and Servant*, -110, 3d ed.), the following case is given: In an action of trespass of assault and battery, the defendant pleaded that the plaintiff was his servant retained (that is, bound by contract), and departed out of his service, and that the plaintiff laid hold upon him, and led him home to his house to do his service. But this was adjudged no plea; for that it was not lawful for the master in this case to beat or forcibly compel his servant to return to his service. But he should require him to do it, and if he will not, the master may have an action of covenant against his servant. *Ib.*; 38 *Hen.* 6, p. 25. "And as the master cannot by beating, nor by force, compel his servant to serve him against his will; no more can a lord compel his ward by beating, or by force, to come unto him, nor to tarry with him against his will. But if he do depart from him, then the lord is to have his action against him." *Ib.* p. 7 *b*; 38 *Hen.* 6, p. 25; 22 *Lib. Ass.* pl. 85. If the party was the defendant's slave or villain, that was a good plea. *Bracton*, 145 *b*.

If one commanded, procured, or aided another to assault or beat the plaintiff, the latter could maintain trespass against either or both. *Ib.*; 22 *Lib. Ass.* pl. 59; 27 *Lib. Ass.* pl. 4; 21 *Hen.* 6, p. 39.

The law as to injuries received in games and sports was, and (as far as the games are lawful) doubtless is still, thus: "If two or more do agree together to run at tilt, joust, barriers, or to play at backsword, bucklers, football, or such like, and one of them doth

beat, bruise, or wound another, the party grieved shall not have an action of trespass of assault and battery against the other; for that it was a combat by consent, and put in practice to try their strength, valor, or agility, and not to break the peace. But if the same day or some other after that the pastime is at an end, and they departed asunder, one will assault or beat another in respect of some wrong conceived to be received in the time of the said play, then an action of trespass of assault and battery may be pursued by him that is so beaten against the trespasser." *Ib.* See *infra*, p. 231, as to boxing matches at the present time.

It was a good justification also that the defendant was a rogue, vagabond, or sturdy beggar, under the *St.* 39 *Eliz.* c. 4, and that he was taken begging, vagrant, and misordering himself, and that upon his apprehension, by the appointment of a justice, constable, headborough, or tithing-man, he was stripped and whipped until the blood came. *Ib.*

To a plea of not guilty, it was at this time adjudged a good replication that the defendant had been convicted of the offence at the suit of the king; the judgment, though *res inter alios*, being held conclusive in favor of the plaintiff. And in the same case the defendant having next pleaded son assault demesne, the plaintiff demurred because the defendant had set up the same plea in the criminal trial; and the plea was withdrawn. *Ib.* p. 10 *b*; 11 *Hen.* 4, p. 65; 9 *Hen.* 6, p. 60; 27 *Lib. Ass.* pl. 57.

Within the action of trespass for assault and battery all torts to the person were formerly embraced, and might still be embraced. But at the present time the term is generally applied only to voluntary, wilful injuries of one's per-

son; while those torts which arise out of negligence have come to be considered as a distinct group.¹ As a matter of convenience, especially in view of the fact that there is a large number of torts arising from negligence to *property*, it has been thought advisable to present the subject of negligence by itself. Under assault and battery we shall therefore consider injuries of a wilful character only. And in view of the fact that in this aspect the law is more frequently put into force on the criminal side, and has been extensively considered by all of the writers on criminal law, it will not be necessary to present it at great length.

Assault. — The principal case, *Stephens v. Myers*, and many other cases, show that an action is maintainable for a mere assault, though that term, when used in contradistinction to battery, means something less than actual contact. Thus, every attempt to offer, with force and violence, to do hurt to another, though not carried out, constitutes an assault; such as striking at a person within reach, with or without a weapon; holding up the fist in a threatening attitude sufficiently near to be able to strike the plaintiff; presenting a gun or pistol, whether loaded or unloaded (see *infra*), in a hostile and threatening manner, within gunshot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip, threatening to beat him, or shaking a whip at a man's face; or, finally, any gesture or threat of violence, exhibiting an intention to assault, with the means of carrying that intention into effect. Addison, *Torts*, 569 (4th ed.); *Read v. Coker*, 13 Com.

B. 860. But the parties, in the last case mentioned, must be near enough to each other to make contact possible. *Cobbett v. Grey*, 4 Ex. 744.

The intention of the party making a threatening gesture is important. In *Tuberville v. Savage*, 1 Mod. 3, the defendant offered to prove as a provocation that the plaintiff put his hand upon his sword and said: "If it were not assize time, I would not take such language from you;" and the question was, if that showed an assault. The court agreed that it was not, on the ground that the intention as well as the act makes an assault. "Therefore," it was said, "if one strike another upon the hand, or arm, or breast, in discourse, it is no assault, there being no intention to assault. But if one, intending to assault, strike at another and miss him, this is an assault. So, if he hold up his hand against another in a threatening manner, and say nothing, it is an assault."

So, in *Blake v. Barnard*, 9 Car. & P. 626, Lord Abinger, C. B., instructed the jury with reference to an alleged assault with a pistol, that if the defendant, at the time he presented it, added words showing that it was not his intention to shoot the plaintiff, that would be no assault. See also *State v. Crow*, 1 Ired. 376; *Handy v. Johnson*, 5 Md. 450.

But the intention to assault does not seem to be the test in every case. In the case just referred to, indeed, the learned Chief Baron told the jury that if the pistol was not loaded it would be no assault, because, apparently, there could be no intention to shoot in such case; but in the same volume of *Re-*

¹ One important result in the change to the present common mode of declaring in negligence for personal injuries is, that the plaintiff takes upon himself the burden of proving the defendant's negligence, — a thing which he would escape by declaring in assault and battery.

ports there is a similar criminal case, in which, in reply to counsel, Mr. Baron Parke said: "It seems to me that it is an assault to point a weapon at a person, though not loaded, but so near that, if loaded, it might do injury. I think the offence of pointing a loaded gun at another does involve an assault, unless it is done secretly; and I think that the presenting a fire-arm, which has the appearance of being loaded, so near that it might produce injury if it was loaded and went off, is an assault." *Regina v. St. George*, 9 Car. & P. 483.

The point has been decided in the same way in this country. *Beach v. Hancock*, 27 N. H. 223; *Richels v. State*, 1 Sneed, 606; *State v. Smith*, 2 Humph. 457. In *Beach v. Hancock*, it appeared that the defendant, while engaged in an angry altercation with the plaintiff, aimed a gun at him in an excited and threatening manner, and snapped it twice. It was not, in fact, loaded; but the plaintiff did not know whether it was loaded or not. It was held that there had been an assault. The ground of decision was thus stated by Gilchrist, C. J., speaking for the court: "We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner; when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity."

Battery.—A battery consists in a violent, angry, rude, or insolent striking or touching of a person, either by

the defendant or by any substance put in motion by him. *Addison, Torts*, 571 (4th ed.); *Hawkins*, book 1, c. 62, § 2.

Mr. Addison gives the following examples from the cases: When a man is violently jostled out of the way or spit upon (*Regina v. Cotesworth*, 6 Mod. 172), or has water, stones, or dirt rudely thrown upon him (*Pursell v. Horn*, 8 Ad. & E. 604), or has his hat insolently knocked off, or his hair forcibly cut (*Forde v. Skinner*, 4 Car. & P. 239), or if his horse has been struck, so that it ran away and threw him on the ground (*Dodwell v. Burford*, 1 Mod. 24).

From this language and the examples given, it will be seen that the test of liability lies in the nature of the defendant's conduct, and not in the doing of actual harm. An actual injury to the person is not a battery if the defendant was at the time free from fault; as where he was engaged in assisting a drunken man, or preventing him from going without help. *Buller*, N. P. 16. But if the battery be the result of negligence, the defendant will be liable; as in *Weaver v. Ward*, Hob. 134; where it was held on demurrer that if one soldier hurt another through negligence, though it be done in the lawful practice of arms, he is liable in trespass for assault and battery. (It is worthy of note that this case illustrates the fact that negligent injuries of the person were formerly declared upon as cases of assault and battery.)

So, if the defendant, while engaged in an unlawful affair, hurt another, though wholly without intention, he will be liable for the battery; as where one of two parties in fight unintentionally hits another. *James v. Campbell*, 5 Car. & P. 372. So, if two men engage in a boxing match or prize-fight,

an action can be maintained by either of them against the other, if an assault be made; because the act of boxing or prize-fighting is unlawful, and the consent of the parties to fight cannot excuse the injury. *Stephens* N. P. 211; *Bell v. Hansley*, 3 Jones, 131. The maxim *volenti non fit injuria* does not apply to unlawful agreements of this kind. *Ib.* And the case is not different if the plaintiff had agreed to clear the defendant from the law. *Stout v. Wren*, 1 Hawks, 420. As to the old law concerning injuries received in games and sports, see *supra*, p. 229.

Son Assault Demesne. — It is a principle of plain common sense that a man when attacked should be permitted to defend himself. The plea of son assault demesne means that the assault complained of was the effect of the plaintiff's own attack; that is, the blow was given in defending the party's person, family, or property from the trespass of the plaintiff.

But the defendant is justified only in making *defence*; and if he replied to the plaintiff's assault or trespass with a force and spirit altogether disproportionate to the provocation, the plaintiff may reply *de injuria sua propria*. This excess of force is, as it were, a new assault. And therefore it is, that, in connection with son assault demesne the defendant's plea says, *molliter manus imposuit*, he gently laid his hands upon the plaintiff. This is a good plea, because it shows that the defendant has not used more force than was necessary in resisting the plaintiff. If, however, the action be for an assault and battery and *wounding*, this plea would not be good, for it would not justify the *wounding*. *Boles v. Pinkerton*, 7 Dana, 453; *French v. Marstin*, 24 N. H. 440; *Brubaker v. Paul*, 7

Dana, 428; *Scribner v. Beach*, 4 Denio, 448.

As to defences of property, there is a distinction in respect of possession. The plea of son assault is good if the defendant was in possession, but if not it is bad, though he have a perfect right of possession. *Parsons v. Brown*, 15 Barb. 590; *Andre v. Johnson*, 6 Blackf. 375; *Suggs v. Anderson*, 12 Ga. 461.

In *Suggs v. Anderson* the defendant was owner of the house in which the trespass was committed; the house being occupied by a third person, by whose permission the plaintiff was there. And the plaintiff had judgment.

And as to a person in possession, if the trespass is unaccompanied with violence, the party in possession will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and then, if he refuses, he may gently lay his hands upon him for the purpose of removing him; and, if he resist, force sufficient to expel him may be exercised. *Scribner v. Beach*, 4 Denio, 448.

Master and Servant. — If a servant be beaten by a stranger, so that any loss of service is incurred by the master, the law has always given a right of action to the latter, even from the earliest times, as we have seen. *Ante*, p. 222. See *Gilbert v. Schwenck*, 14 Mees. & W. 488; *Duel v. Harding*, 1 Strange, 595; *Smith, Master and Servant*, 137 (3d ed.). The master, however, is not allowed to sue for the battery, and never was; damages for this belong to the servant. The master can only recover in case he can prove a loss of service. If, therefore, the servant was incapable of service, by reason of tender years, physical infirmity, or other cause, the master would have no right of action for the assault or battery;

though it would probably be otherwise if the servant were carried away. But in this case the ground of action would be an invasion of the master's right to the possession of the servant, and not a loss of service.

If there be a capacity to render service, evidence of very slight services will be sufficient to enable the master to recover. See *Dixon v. Bell*, 1 Stark. 287; s. c. 5 Maule & S. 198. Indeed, in modern cases, where there is proved to be a capacity to serve, the tendency of the courts has been to infer service from residence with the master or parent, without proof of actual service. *Smith, Master and Servant*, 138 (3d ed.); *Jones v. Brown*, Peake, 233; s. c. 1 Esp. 217; *Maunder v. Venn*, Moody & M. 323; *Torrence v. Gibbins*, 5 Q. B. 300. Where a child is of such tender years as to be incapable of service, or where, from infirmity, there is an inability to perform service, the action must be brought by the child or servant. *Ib.* And it is immaterial whether the relation be that of master and servant strictly or parent and child. A parent, suing for a mere assault and battery, can only recover for loss of service, actual or presumed (from the capacity of the child); he has no legal claim to damages for wounded feelings. *Flemington v. Smithers*, 2 Car. & P. 292. If, however, he sues for seduction also, juries are allowed, as will be seen in the note on Seduction, to award exemplary damages.

It matters not in these cases that there is no binding engagement to service; if a person be willing to serve another gratuitously, third persons have no right to prevent the master from enjoying the benefit of the service. *Martinez v. Gerber*, 8 Man. & G. 88; *Evans v. Walton*, 36 Law

J. C. P. 307. See note on Seduction, *post*.

"It is laid down in all the books," says Mr. Reeve, "that when a servant is so beaten that he dies, the master has no remedy; for the civil injury is merged in the felony. On what principle does this doctrine rest? When one man has done another an injury, because it is of such a nature that he deserves death, surely this is not a reason why the injured person shall have no remedy. I apprehend that the figurative language that the civil injury is merged in the felony is incorrect. The real ground on which this doctrine exists is, that both the life and estate of a felon are forfeited. An action would therefore be fruitless. If this be the principle which governs in such cases, then in this country, where there is no such forfeiture, the civil injury is not merged." Dom. Rel. 537 (3d ed.).

Mr. Smith states the rule in England to be that if the servant die, the master must proceed first by indictment, as public policy will not allow him to recover damages for a private injury until public justice is satisfied by the trial of the offender. After trial, the master may bring his action for damages whether the offender be convicted or not, as the private right is only suspended until public justice is vindicated. *Master and Servant*, 139, citing *Crosby v. Leng*, 12 East, 409; *Stone v. Marsh*, 6 Barn. & C. 551; *White v. Spettigue*, 13 Mees. & W. 608.

A servant may justify a battery in favor of his master; that is, he may do any thing in his master's defence which his master might himself lawfully do. Reeve, Dom. Rel. 538 (3d ed.). But whether the master may justify a battery in defence of his servant is an unsettled question. Mr. Reeve says that the better opinion, in his view, is that the

right is reciprocal. It is the servant's duty to defend his master; and it is the master's interest to defend his servant. *Ib.* See *Leward v. Basely*, 1 *Ld. Raym.* 62, where it was held that the master could not justify in such case, on the ground that he would have a right of action against the offender *per quod servitium amisit*. But see 1 *Black.*

Com. 429; 1 *Hawk. P. C.* book 1, c. 60. As to the law in the time of the Year-Books, see *supra*, p. 228.

As to the right of a master to inflict corporal punishment upon a servant, see *supra*, p. 229; also *Smith, Master and Servant*, 110 (3d ed.), where it is said that there is no such right except in the case of servants who are under age.

FALSE IMPRISONMENT.

BARKER v. BRAHAM, leading case.
 WEST v. SMALLWOOD, leading case.
 SAVACOO v. BOUGHTON, leading case.
 FOX v. GAUNT, leading case.
 HOGG v. WARD, leading case.
 TIMOTHY v. SIMPSON, leading case.
 ALLEN v. WRIGHT, leading case.

Note on False Imprisonment.

Historical aspects of the subject.

Arrest.

Arrests with warrant.

Arrests without warrant.

BARKER, Administratrix v. BRAHAM and NORWOOD.

(2 W. Black. 866; s. c. 3 Wils. 868. King's Bench, Hilary Term, 1778.)

Void ca. sa. sued out by Attorney. Action of false imprisonment lies against the plaintiff's attorney, who sues out an illegal and void *ca. sa.* against the defendant, and delivers it himself to the officer, who by his order arrests the defendant thereon.

TRESPASS and false imprisonment. Joseph Barker, the husband of the plaintiff, was indebted on bond to Jenny Braham in 400*l.*, conditioned for the payment of 200*l.* Braham, on the death of Barker, brought her action in the King's Bench against the plaintiff, his administratrix, and recovered judgment for want of a plea, the 31st of January, 1769. On the 1st of February, a *fi. fa.* issued, marked to levy 239*l.* 11*s.* 2*d.*, debt and costs of the goods of Joseph Barker, if, &c.; if not, then damage *de bonis propriis*. The sheriff levied 164*l.* 9*s.* of the intestate's goods, out of which he paid 38*l.* for rent, and on settling the account there remained due to the plaintiff Braham 102*l.* 18*s.* 1*d.*, for which (without suggesting any *devastavit*) Norwood (as attorney for Braham) sued out a *ca. sa.* against Barker on the 13th of February, reciting what had been levied under the *fi. fa.*, and directing the sheriff to take her body for the *residue of the debt and damages*. This was personally delivered by Norwood to Armstrong, the bailiff, with orders to execute it immediately.

He accordingly arrested her the 15th March, 1769, and she lay in custody till the 18th of November following, when, upon motion to the Court of King's Bench, the *ca. sa.* was set aside for irregularity, and the then defendant, Barker, discharged out of custody. For this illegal imprisonment Barker brought this action against Braham, the plaintiff, and Norwood, the attorney in the original cause; and, on the general issue pleaded, the jury gave her 150*l.* damages. And in last Michaelmas Term, *Sayer* moved for a new trial, because the damages were given against Norwood, the attorney, as well as against Braham; and no action, he alleged, lay against the attorney for such false imprisonment by a mistake in the conduct of a cause.

Davy and *Burland* showed cause. *Sayer* and *Glyn*, in support of the rule.

DE GREY, C. J. It is clear the plaintiff Barker has been injured, the *ca. sa.* being illegally taken out (1 Lev. 95; Raym. 73); which is recognized as good law in *Prigg* and *Adams*, Carth. 274; Salk. 674; 12 Mod. 178; 2 Wilson, 385. The persons injuring are either the officer arresting, Braham, the original plaintiff, or Norwood, the attorney, or some, or all of them. The officer is not sued. If he had been, he might clearly have justified under the writ, though that be not set aside. 1 Roll. Rep. 403. The plaintiff, when sued for imprisonment by process, which he had procured to be taken, must plead the general issue, and give in evidence the judgment, and a regular writ. Sir T. Jones, 215; Stra. 509: he is answerable for the act of his attorney as if his own. So held the last term in the case of *Parsons* and *Lloyd*. The attorney has also denied the fact of false imprisonment, by pleading the general issue. Indeed he could not justify by so qualifying the act as to show there was *no* assault or imprisonment; but he says that what he has done is not by law a trespass. To establish this, it is said that the act of an attorney in such a case is only the act of a servant or messenger, who conveys the plaintiff's orders. But attorneys were always of a higher estimation in the law than this construction would make them; and their powers are very great, as stated in *Bracton*, 369. Now, there being no accessaries in trespass (Co. Litt. 57), the attorney must either be guilty as a principal or not at all. And it is held, that a trespasser may be not only he who does the act, but who commands or procures it to be done

(Bro. Trespass, 148, 307); who aids or assists in it (Bro. Trespass, 232; Salk. 409; Pulton De Pace, 22, 4, 49); or who assents afterwards (Bro. Trespass, 113). According, then, to this doctrine, Braham *virtually* (by the medium of her attorney, whose acts are imputable to her), but Norwood *actually*, by commanding the arrest, is guilty of the present trespass. I allow that an attorney is not chargeable to the defendant for bringing an action, be it ever so groundless or vexatious, for therein he pursues his instructions, and the plaintiff only knows the true merits. 36 Hen. 6, 37; 26 Hen. 6, 34; 2 Keb. 88. (Add 1 Roll. R. 408, 1 Mod. 209). But in the conduct of a cause, if he does an injury to the plaintiff by suing out a void process, an action on the case will lie at the common law (for the writ of deceit was added by stat. Edw. 1), in case the injury be done to his *property*. And of course if the injury be to the person, trespass will lie against him. In the present case, the evidence of the personal injury is extremely strong; for Norwood gave this void writ to the officer with his own hands, and ordered him to arrest Mrs. Barker. And the permitting this action to be brought against Norwood in the first instance prevents that circuitry which is disgraceful to justice; for it is allowed that Braham is answerable to Barker, and Norwood to Braham. No reason, therefore, that Norwood should not be immediately answerable to Barker.

GOULD, BLACKSTONE, and NARES, JJ., concurred that this action well lay against the attorney; whereupon the

Rule was discharged.

WEST v. SMALLWOOD.

(8 Mees. & W. 418. Exchequer, England, Easter Term, 1838.)

Jurisdiction. Officer's Liability. Where a party lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate grants a warrant, upon which the party charged is arrested, the party laying the complaint is not liable as a trespasser, although the particular case be one in which the magistrate had no authority to act.

The complainant having accompanied the constable charged with the execution of the warrant, and pointed out to him the person to be arrested, *held*, that this was evidence to go to the jury of a participation in the arrest.

TRESPASS for assault and false imprisonment. Plea, the general issue.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after Hilary Term, it appeared that the plaintiff was a builder, and had been employed by the defendant to build some houses for him under a specific contract. Whilst the work was going on a dispute arose between the plaintiff and defendant, and the plaintiff in consequence discontinued the work, upon which the defendant went before a magistrate and laid an information against him, under the Master and Servant's Act, 4 Geo. 4, c. 34, § 3. The magistrate having granted a warrant, the defendant accompanied the constable who had the execution of it, and pointed out the plaintiff to him. Upon being brought before the magistrate, the complaint was heard and dismissed. Lord Abinger, C. B., was of opinion that the action was misconceived, and should have been in case; and thought that the evidence of interference in the arrest by the defendant was too slight to make him a trespasser; and the plaintiff's counsel not having pressed his lordship to lay that question before the jury, the plaintiff was nonsuited.

Kelly now moved to set that nonsuit aside, and for a new trial. It is conceded, that when an information is laid before a magistrate in a case over which he has jurisdiction, and the magistrate grants a valid and legal warrant, on which the party is apprehended, the party cannot bring trespass, but must sue in case. In such case the magistrate is bound to issue his warrant, and is not a trespasser, because he is acting within his jurisdiction; nor is the officer a trespasser, because he acts under the warrant. But that rule only applies to a case where the magistrate has jurisdiction. If a complaint be made, and the magistrate be put in motion by the party complaining, in a matter over which he has no jurisdiction, he is a trespasser, and all who act with or under him are trespassers also, because in trespass there is no distinction between principals and accessories. There is, perhaps, no decision in point on this particular statute, but the case of *Moravia v. Sloper*, Willes, 80, may be applied by analogy. It was there held, that when a party pleads a justification under the process of an inferior court he must show that the cause of action arose within the jurisdiction of that court. In *Rafael v. Verelet*, Sir W. Black. 983, 1055, where the defendant had made a com-

plaint to a sovereign prince in India, who had in consequence imprisoned the plaintiff, it was held that trespass was maintainable. [LORD ABINGER, C. B. I do not see in what way the defendant can be a trespasser. He goes to a magistrate, and calls upon him to exercise his judgment, and though the magistrate, if he exceeds his authority, may be liable as a trespasser, the party who lays the complaint is not. ALDERSON, B. The complainant has nothing to do with the assumption of jurisdiction by the magistrate. LORD ABINGER, C. B. The party does no more than lay the facts before the magistrate, who exercises his discretion judicially in granting a warrant. This distinguishes it from the case of a sheriff, who is put in motion by the party, as he does not act judicially; but in this case the defendant does not put the magistrate in motion; he applies to a magistrate having a general jurisdiction over the subject-matter, and makes his complaint, and the magistrate acts upon it or not, at his discretion. ALDERSON, B. In *Rafzel v. Verelet*, Lord Chief Justice De Grey says, Sir W. Black. 1085: "I consider the Nabob as not being the actor in this case; but the act to be done in point of law by those who procured or commanded it, and in them it doubtless is a trespass;" so that he considers the Nabob not as the actor.] There is another ground upon which the case ought to have gone to the jury, because here the defendant acted personally in the arrest, and pointed out the plaintiff to the constable. *Hardy v. Ryle*, 9 B. & Cr. 608, and *Lancaster v. Greaves*, ib. 628, are authorities to show that the statute 4 Geo. 4, c. 34, gives the magistrate authority only in cases where the relation of master and servant exists, and does not extend to such a case as the present. The magistrate, therefore, had no right to grant a warrant, unless he was clearly satisfied that the relation of master and servant existed. The onus of justifying the participation by the defendant in making the arrest lies on the defendant, and the plaintiff may maintain the action without producing the warrant. *Holroyd v. Doncaster*, 11 Moore, 441; 3 Bing. 492; *Elsee v. Smith*, 1 Dowl. & Ry. 97; 2 Chit. 304.

LORD ABINGER, C. B. I retain the opinion which I expressed at the trial. Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is

not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate acting without any jurisdiction at all is liable as a trespasser in many cases, but this liability does not extend to the constable, who acts under a warrant, and the statute 24 Geo. 2, c. 44, was passed with this very object of protecting such officers. As to the other part of the case, I do not deny that the fact of the defendant's presence when the plaintiff was taken, and his pointing him out to the constable, might make it a case to go to the jury, but that was not pressed on the part of the plaintiff.

BOLLAND, B. I am of the same opinion, and for the same reasons. With regard to the case of the sheriff, that is clearly distinguishable from the present, because the party puts the sheriff in motion, and the latter acts in obedience to him. In the case of an act done by a magistrate, the complainant does no more than lay before a court of competent jurisdiction the grounds on which he seeks redress, and the magistrate, erroneously thinking that he has authority, grants a warrant. As to the subsequent conduct of the defendant, all he does is to point the plaintiff out to the constable as the person named in the warrant, but this does not amount to any active interference. If any malice could be shown, it might have formed the ground of an action on the case.

ALDERSON, B. As to the first point, the party must be taken to have merely laid his case before the magistrate, who thereupon granted a warrant adapted to the complaint. Then, what has been done by the defendant to make him liable as a trespasser? He would be liable only in case, if he was actuated in what he did by malice. Then comes the second question; and I agree in the doctrine, that if the defendant took an active part with the constable in apprehending the plaintiff, he must have failed on the state of these pleadings, because it would have been incumbent on him to show that he had a right so to do, which he could only have done under a special plea, and could not do under the general issue. But all that the defendant did in this instance was to point out to the constable the party who was to be arrested. And though undoubtedly that was evidence for the jury, yet where counsel submits to the view taken of the evidence by the judge at *nisi prius*, and does not claim to have it left to the jury, I think we ought not to interfere. *Rule refused.*

SAVACOOŁ v. BOUGHTON.

(5 Wend. 170. Supreme Court, New York, July, 1830.)

Jurisdiction. A ministerial officer is protected in the execution of process, whether the same issue from a court of limited or general jurisdiction, although such court have not in fact jurisdiction in the case, provided that on the face of the process it appears that the court has jurisdiction of the subject-matter, and nothing appears in the same to apprise the officer but that the court also has jurisdiction of the person of the party to be affected by the process.

DEMURRER to replication. The plaintiff declared in trespass for an assault, battery, and false imprisonment. The defendant pleaded, 1. The general issue; 2. A justification, for that he as a constable, by virtue of an execution issued by a justice of the peace, on a judgment rendered against the plaintiff in assumpsit for \$7.38, arrested the plaintiff and committed him to jail; and, 3. A similar justification, setting forth the judgment. The plaintiff replied to the second and third pleas *precludi non*, because, previous to the rendition of the judgment set forth by the defendant, the justice who rendered the same did not issue any process for the appearance of him (the plaintiff) in the suit in which the judgment was rendered, and that he (the plaintiff) did not direct or authorize the justice to enter a judgment by confession in favor of the plaintiffs in the suit, against him (the plaintiff in this cause), nor did the parties in the said suit appear before the justice and join issue, pursuant to the provisions of the \$50 act; and this, &c., wherefore, &c. To this replication the defendant demurred, and the plaintiff joined in demurrer.

M. Taggart, for defendant. *P. L. Tracy*, for plaintiff.

By the court, MARCY, J. What an officer is required to show to justify himself in the execution of process is not very clearly settled. There is considerable contrariety of authority on the subject. Where it appears on the face of the process that the court or magistrate that issued it had not jurisdiction of the subject-matter of the suit, or of the person of the party against whom it is directed, it is void, not only as respects the court or magistrate and the party at whose instance it is sued out, but it affords no protection to the officer who has acted under it.

Where the court issuing the process has general jurisdiction,

and the process is regular on its face, the officer is not, though the party may be, affected by an irregularity in the proceedings. Where a judgment is vacated for an irregularity, the party is liable for the acts done under it; but the officer has a protection by reason of his regular writ. 1 Lev. 95; 1 Sid. 272; 1 Strange, 509.

More strictness has been required in justifying under process of courts of limited jurisdiction. Many cases may be found wherein it is stated generally that when an inferior court exceeds its jurisdiction, its proceedings are entirely void, and afford no protection to the court, the party, or the officer who has executed its process.

This proposition is undoubtedly true in its largest sense where the proceedings are *coram non judice*, and the process by which the officer seeks to make out his justification shows that the court had not jurisdiction; but I apprehend that it should be qualified where the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause. A court may have jurisdiction of the subject-matter, but not of the person of the parties. If it does not acquire the latter, its proceedings derive no validity from the former. A justice of the peace who should give judgment against a person on a promissory note under \$50, without having issued process of any kind against him, or taken his confession, or without his voluntary appearance in court, would exceed his jurisdiction and be responsible to the party injured; so would the party who procured the court to exceed its authority. But would the officer to whom an execution on this judgment had been issued be liable for acts done in obedience to it, if nothing appeared to show that the justice had not jurisdiction of the defendant's person? This is the question presented by the demurrer in this case.

A distinction has long existed in cases of this kind, between the court which exceeds its jurisdiction and the party at whose instance it takes place, and a mere ministerial officer who executes the process issued without authority. This prevails, as we have seen, where a judgment has been obtained in a court of general jurisdiction which is subsequently set aside for irregularity. The officer has a protection that the party has not, and that, whether the court from which the process issues is a court

of general or limited jurisdiction. The right of a mere ministerial officer to justify under his process where the court or party cannot, was considered, but not settled, in the case of *Smith v. Bouchier and Others*, decided in 1734. This case is found in 2 Strange, 993; 2 Barnard. 331; Cunn. 89, 127; Cases temp. Hardwicke, 62; 2 Kelyn. 144, pl. 123. The reports agree as to the facts, but not as to some points in the opinion of the court. Process was issued from the chancellor's court of Oxford against Smith, who was arrested and committed to jail. The proceedings were instituted without proving what was requisite to give the court jurisdiction. The plaintiff who procured the proceedings, the vice-chancellor who held the court, and the officers who executed the process, were all sued by the defendant Smith for false imprisonment. They united in their plea of justification, and were all pronounced guilty. Sir John Strange makes the court say that some of the defendants, namely, the officer and jailer, might have been excused if they had justified without the plaintiff and vice-chancellor. The Court of Common Pleas in England, in their opinion in the case of *Perkin v. Proctor and Green*, 2 Wilson, 382, say that Lord Hardwicke denied that such could have been the case. It appears from the case, as reported in Hardwicke's Cases, 69, that the point of the officer's liability was not settled; for it is there said that there was no need of giving a distinct opinion as to the action lying against them.

In *Hill v. Bateman*, 2 Strange, 710, the distinction in favor of the officer is clearly taken. The plaintiff had been fined under the game laws, and was immediately sent to bridewell, without any attempt to levy the penalty upon his goods. This the justice had not a right to do, and was held liable for the imprisonment; but the constable was justified, because the matter was within the jurisdiction of the justice. I understand by this case that the justice had not authority, or, in other words, had not jurisdiction, to issue process to commit the party until he had attempted to levy the fine upon his goods; but that after he had made that attempt without success, he had authority to commit him. The process, though unauthorized by the circumstances of the case, would, under other circumstances, have been proper. The issuing of the process was a matter within the justice's jurisdiction. This was enough for the officer's justification. It is further said in this case, if the justice makes a warrant which is

plainly out of his jurisdiction, it is no justification. This I understand to mean a warrant which appears on its face to be such as the justice could in no case issue.

The views I have of this case are confirmed by that of *Shergold v. Holloway*, 2 Strange, 1002. There the justice issued a warrant on a complaint for not paying wages, and the defendant, a constable, arrested Shergold on it. He was sued for this arrest. The court said the justice had no authority in any instance to proceed by warrant, a summons being the only process. The constable could not therefore justify; he was presumed to know that under no circumstances could a warrant be issued in such a case; therefore the court say there was "no pretence for such a justification." This decision would doubtless have been different if it had appeared that under any state of things a proceeding by warrant was allowable in such a case; for then the court would assume for the officer's protection that such a state of things did exist, or, at least, he should not be required to judge whether it did or not. His duty and his protection both depend upon the assumption that the justice had determined correctly, that those circumstances had happened which called for a warrant, if under any circumstances a warrant could issue. In the case of *Moravia v. Sloper*, Willes, 30, the same distinction which has been noticed in the cases before referred to is still more distinctly put forth. It is there said that "though in case of an officer who is obliged to obey the process of the court, and is punishable if he does not, it may not be necessary to set forth that the cause of action arose within the jurisdiction of the court; it has always been holden, except in one case (the correctness of which C. J. Willes controverted in another part of his opinion), and we are all clearly of opinion that it is necessary in the case of a plaintiff himself."

Lord Kenyon says, in the case of *The King v. Danser*, 6 T. R. 242, "A distinction indeed has been made with respect to the persons against whom an action may be brought for taking the defendant's goods in execution by virtue of the process of an inferior court, where the cause of action does not arise within its jurisdiction; the *plaintiff* in the cause being considered a trespasser, but not the *officer* of the court." A court of admiralty, I apprehend, will not be considered a court of general jurisdiction. In relation to its proceedings, Buller, J., says, in the case of

Ladbroke v. Crickett, 2 T. R. 658, if upon their face "the court had jurisdiction, the officer was bound to execute the process, and could not examine into the foundation of them; and that will protect him."

There are several cases in our own Reports which are supposed to militate against the distinction recognized in the foregoing cases; I apprehend, however, that most of them may be reconciled with those decisions which support it. The decision in the case of Borden v. Fitch, 15 Johns. R. 121, was, that a court must not only have jurisdiction of the subject-matter, but of the person of the parties, to render its proceedings valid; and if it has not jurisdiction of the person, its proceedings are absolutely void. It will be recollected that the person who wished to avail himself of the proceedings of the court whose jurisdiction was impeached, was a party to them. There was no occasion or opportunity afforded by that case of considering the question involved in this, the liability of the officer, who, as a minister of the court, has executed its process issued on such proceedings.

The case of Cable v. Cooper, 15 Johns. R. 152, deserves a more minute consideration. One Brown was committed on a *ca. sa.* to the custody of the defendant, who was sheriff of Oneida County, and discharged by a Supreme Court commissioner under the *habeas corpus* act. The defendant, when prosecuted for the escape of Brown, offered to justify by showing the discharge; but a majority of the court decided that the proceedings under the *habeas corpus* act before the commissioner were *coram non judice*, and therefore void. The principle of this decision is, that the power to discharge under that act does not apply to the case of a prisoner who "is *convict or in execution by legal process.*" Brown was in execution by legal process, and this was well known to the defendant, for he had the *ca. sa.*, and held the prisoner. Whatever appeared upon the face of the discharge, he knew, if he rightly understood the powers of the commissioner, it was no authority for him to release Brown. If the discharge did not relate to the imprisonment on the *ca. sa.*, it was certainly no authority to release him from confinement thereon; and if it did relate to that imprisonment, then it showed on its face a want of jurisdiction in the officer who granted it; for he could not discharge a person in execution by legal process. Again, the sheriff who held the prisoner might well be regarded

as a party to the proceeding before the commissioner for the discharge; for the *habeas corpus* must have been directed to him, and his return thereto showed the true cause of Brown's detention.

The cases of *Smith v. Shaw*, 12 Johns. R. 257, and *Suydam and Wyckoff v. Keys*, 13 ib. 444, have a tendency to obliterate, or at least confound, the distinction which the other cases seem to me to raise in favor of the officer. I am free to confess that the reasoning and conclusion of the judge who delivered the dissenting opinion in the former case are more satisfactory to me than those contained in the opinion adopted by a majority of the court. Smith, in that case, was not looked upon in the light of a mere ministerial officer. He was superior in authority to Hopkins and Findley, who had illegally imprisoned the plaintiff; and his liability was put expressly upon the ground that he had ratified and confirmed their acts, and exercised other restraint over the plaintiff than merely continuing the original imprisonment. If he had only refused to discharge the prisoner, he would not, as is strongly intimated by the court, have been held liable. This case was not considered by the court as presenting the question which arises in the one now before us, and therefore it can afford but little authority to guide our present determination.

It seems to me somewhat difficult to reconcile the decision in the case of *Suydam and Wyckoff v. Keys*, with the doctrine I am endeavoring to establish, or with the principles of some other cases which have been decided here. The defendant was a collector of a tax which had been voted by a school district in Orange County, and assessed by the trustees. They had authority to assess, but were confined in their assessments to the *resident inhabitants* of the district. The plaintiffs, having property in the district, but actually resident in New York, were included among the persons assessed, and designated on the warrant issued to the defendant as *inhabitants of the district*. He took their property by virtue of this warrant, and was held liable in an action of trespass. It appears to me the defendant, acting merely as a ministerial officer, should have been allowed the protection of his warrant, which did not show upon the face of it an excess or want of jurisdiction in the trustees. I cannot distinguish this case from a whole class of cases, beginning with the earliest reports and coming down to this, holding that such a

warrant is a protection to the officer executing it, unless it is to be distinguished from cases otherwise similar, by the fact that the want of jurisdiction in the trustees to make the assessment on the plaintiffs was to be presumed to be within the knowledge of the officer, and that he was bound to act on this knowledge, in opposition to the statements of his warrant. The decision, however, is not put on such ground, but upon the broad principle that the officer must see that he acts within the scope of the legal powers of those who commanded him. This principle requires a ministerial officer to look beyond his precept, and examine into extrinsic facts beyond the fact of jurisdiction of the subject-matter generally, or under certain circumstances. Such, I apprehend, was not the doctrine applied to the case of *Warner v. Shed*, 10 Johns. R. 138. There the officer was justified by his process, as that showed the justice's jurisdiction of the subject-matter. "He was not bound," the court say, "to examine into the validity of the proceedings and of the process." The collector's warrant in the former case, as well as the constable's *mittimus* in the latter, showed jurisdiction of the subject-matter in the officers issuing the process. In the former case it appeared upon the face of the process that the plaintiffs were resident inhabitants, and as such they were liable to be assessed; and I should think that the collector was no more bound to examine into the fact of residence which had been passed on by the trustees, than the constable was to look into the proceedings of the special sessions under whose authority he acted.

I find still greater difficulty in reconciling the case of *Suydam and Wyckoff v. Keys* with that of *Beach v. Furman*, 9 Johns. R. 229. The court assume, though they do not directly decide, that Sarah Furman was not, by reason of being a female, liable to be assessed to work on the highways; yet they held that the justice who issued, at the instance of the overseer of the highways, the warrant on which her property was taken and sold for this illegal assessment, and the constable who executed it, both protected, because they acted ministerially and in obedience to the commissioners and overseer of highways, who had jurisdiction over the subject-matter, the assessment of highway labor. Let us compare this case with that of *Suydam and Wyckoff v. Keys*, and see if they can stand together. The commissioners had jurisdiction of the subject-matter, the assessment of labor.

The trustees had jurisdiction of the subject-matter, the assessment of a district tax. The commissioners assessed a person who, by reason of her sex, was not liable to be assessed, as the court in giving their opinion conceded. The trustees assess persons who, by reason of their residence out of the district, were not liable to be assessed; the justice and constable who enforce the commissioner's assessment, by taking the property of the person illegally assessed, are protected; the constable who enforces the illegal assessment of the trustees, by taking the property of the persons illegally assessed, is held liable as a trespasser. I think these cases cannot well stand together, and if one must be given up, I do not hesitate to say it should be *Suydam and Wyckoff v. Keys*.

The remark of this court in the case of *Gold v. Bissell*, 1 Wendell, 213, "that where a warrant cannot legally issue without oath, but is so issued, all the parties concerned in the arrest under such process are trespassers," was not intended, I presume, to apply to an officer who had no knowledge, from the warrant or otherwise, that it had not been duly sued out. A remark somewhat similar is made by Trimble, J., in *Elliott v. Peirsol*, 1 Peters' U. S. Rep. 340; but the decision of that case did not call for any such distinction as is raised in the one now under consideration. I have felt that the case of *Wise v. Withers*, 3 Cranch, 331, is a direct authority against giving to the officer the protection that is now claimed for him. The plaintiff in that case was a magistrate in the District of Columbia, and, as such, not subject to do military duty. He was fined for neglect of such duty, and a warrant for the collection of the fine issued to the defendant, who seized his property thereon; for this act he was prosecuted. The only point much considered in that case was that which involved the question as to the plaintiff's exemption from military duty; but that which related to the defendant's protection under his warrant was only glanced at in the argument of counsel and in the decision by the court. The distinction contended for in this case was scarcely raised there, and the attention of the court does not appear to have been drawn to a single case in which it has ever been noticed. The Chief Justice, in the opinion of the court, merely observes, that it is a principle that a decision of such a tribunal (a tribunal of limited jurisdiction), clearly *without* its jurisdiction, cannot

protect the officer who executes it. I would, with deference, ask whether there is not an error in the application of the principle which the Chief Justice lays down to the case then before the court. He must mean, by a decision being clearly without the jurisdiction of the court, a sentence or judgment on a matter not within its cognizance. Was the subject-matter of that cause beyond the cognizance of a court-martial? It appears to me that it was not. The power and duty of the court was to punish and fine delinquents; consequently, it had jurisdiction over the subject-matter, but not over the person. There was nothing in the process which the ministerial officer executed to apprise him that the court had not jurisdiction of the *person*. It seems to me that it was not a case to which the principle laid down by the court was applicable; but it would have been such a case if there had been a want of jurisdiction over the subject-matter. I can scarcely consider, therefore, the determination of the Supreme Court of the United States in the case of *Wise v. Withers* a deliberate decision on the question now before us. If it was to be viewed in that light, we should be called upon, by the great learning and high character of that court, to hesitate long and examine carefully before we decided a point conflicting with such decision.

There is certainly high authority for the distinction which I am disposed to recognize in this case; and, in my judgment, the same principle which gives protection to a ministerial officer who executes the process of a court of *general* jurisdiction, should protect him when he executes the process of a court of *limited* jurisdiction, if the *subject-matter* of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the *person* was not also within it.

The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority:—

That where an inferior court has not jurisdiction of the subject-matter, or, having it, has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court nor the plaintiff (if he procured or assented to the proceedings) can derive any protection from them when prosecuted by a party aggrieved thereby.

If a mere ministerial officer executes any process, upon the face of which it appears that the court which issued it had not

jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it.

If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the *person* or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process. Bull. N. P. 83; Willes, 32, and the cases there cited by Lord Ch. J. Willes.

I am therefore of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution, not showing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him in virtue of that process.

Judgment on demurrer for the defendant, with leave to the plaintiff to amend his replication on payment of costs.

FOX v. GAUNT.

(8 Barn. & Ad. 798. King's Bench, England, Trinity Term, 1832.)

Warrant. Misdemeanor. Suspicion that a party has, on a former occasion, committed a misdemeanor, is no justification for giving him in charge to a constable without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanor and another, as breach of the peace and fraud.

TRESPASS for an assault and false imprisonment.

The defendant pleaded the general issue, and several pleas in justification: one of which was, that an evil-disposed person and common cheat, to the defendant unknown, had obtained goods from him on false pretences (the particulars of which offence were set out in the plea); that the plaintiff afterwards, and just before the time when, &c., passed by the defendant's shop, and was pointed out to him by the defendant's servant as the person who had so obtained the goods, whereupon the defendant, having good and probable cause of suspicion, and vehemently suspecting and believing that the plaintiff was the person who had committed the

offence, for the purpose of having him apprehended and examined touching the same, at the time when, &c., gave charge of him to a peace officer, and requested such officer to take and keep him in custody till he should be carried before a justice, and to carry him before such justice, to be examined touching the premises, and dealt with according to law; on which occasion the peace officer, at the defendant's request, did so take him, &c., and brought him before a justice to be examined, &c.; and the justice, not being satisfied of the plaintiff's identity, discharged him out of custody, &c. Replication, *de injuria*. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas Term, 1831, the defendant had a verdict on the above special plea. A rule *nisi* was obtained in the following term for judgment *non obstante veredicto*, on the ground that a private person could not justify giving another into custody on suspicion of a misdemeanor.

Hutchinson and *Heaton* now showed cause. It is true the books which treat of arrests by private persons make a distinction between misdemeanor and felony, but that seems applicable to misdemeanors which merely constitute a breach of the peace, where it is clear that, after the offence is over, the arrest cannot be justified; but offences partaking of the nature of felony (as a fraud, which borders upon theft) may come under a different rule. [LORD TENTERDEN, C. J. The distinction between felony and misdemeanor is well known and recognized, but is there any authority for distinguishing between one kind of misdemeanor and another?] There is no direct authority, but in Hawk. P. C. book 2, c. 12, § 20, it is said (after stating that "regularly no private person can, of his own authority, arrest another for a bare breach of the peace after it is over"), "Yet it is holden by some, that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation. Also it hath been adjudged, that any one may apprehend a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of peace; for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping. And from the reason of this case it seems to follow

that the arrest of any other offenders by private persons, for offences in like manner scandalous and prejudicial to the public, may be justified." The same doctrine may be inferred from Hale's P. C. part 2, c. 10, and c. 11, p. 88, 89.

LORD TENTERDEN, C. J. The instances in Hawkins are where the party is caught in the fact, and the observation there added assumes that the person arrested is guilty. Here the case is only of suspicion. The instances in Hale, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanor, it is much better that parties should apply to a justice of peace for a warrant than take the law into their own hands, as they are too apt to do. The rule must be made absolute.

LITLEDAL, PARKE, and TAUNTON, JJ., concurred.

Rule absolute.

HOGG v. WARD.

(8 Hurl. & N. 417. Exchequer, England, Trinity Term, 1858.)

Warrant. Felony. Suspicion. A constable is not justified in arresting a supposed offender for felony, without warrant, at the instigation of a third party, unless there exists a reasonable charge and suspicion.

In June, 1857, the cart of the plaintiff, who was a butcher, was being driven by his servant, when J., a person in the habit of attending fairs, stopped the cart and said to the defendant, a constable, "These are my traces which were stolen at the peace rejoicing in 1856." The defendant sent for the plaintiff, who immediately attended, and asked how he accounted for the possession of the traces. The plaintiff said that he had seen a stranger pick them up in the road, and he had bought them of him for a shilling. The defendant then took the plaintiff into custody, and brought him before a magistrate, by whom he was discharged. *Held*, that under these circumstances there was no reasonable charge, and that the defendant was liable in an action for arresting the plaintiff.

Quære, whether the question of reasonable charge is one for the court or the jury.

TRESPASS for false imprisonment. Plea, not guilty (by statutes 7 Jac. 1, c. 5, § 1; 21 Jac. 1, c. 12, § 5; 19 & 20 Vict. c. 69, § 1; 2 & 3 Vict. c. 93, § 8; 1 & 2 Wm. 4, c. 42, § 19).

At the trial before Martin, B., at the Spring Assizes for the county of York, it appeared that on the 9th of June, 1857, the plaintiff, a butcher residing at South Cave, was arrested by the defendant, the superintendent of police for the district, for

having in his possession some traces alleged to have been stolen from one Johnson, who was a person in the habit of attending fairs as an itinerant showman. The traces were on the horse in the plaintiff's cart, which was being driven by his servant at Cave fair. Johnson stopped the cart and said to the defendant, "These are my traces which were stolen at the peace rejoicing in 1856." The defendant sent for the plaintiff, who at once attended. The defendant asked the plaintiff how he accounted for the possession of the traces. The plaintiff stated that he had seen a stranger pick them up in the road, and that he had bought them of him for a shilling. The defendant then handcuffed the plaintiff and detained him in custody till the next morning, when he was taken before a magistrate, who immediately discharged him. According to the evidence of the plaintiff and another witness, Johnson was not present when the defendant took the plaintiff into custody, but the defendant, who was called as witness on his own behalf, stated that Johnson said to him, when the plaintiff arrived, "These are my traces, and I insist upon your taking him into custody." The defendant resided about three miles from South Cave, and had known the plaintiff for many years.

At the conclusion of the evidence, the counsel for the defendant submitted to the learned judge that, upon the facts admitted by the plaintiff to be true, the defendant was entitled to have the verdict entered for him. The learned judge intimated that he rather thought there was a question for the jury; and the result was that it was agreed that the opinion of the jury should be taken upon the amount of damages, and the question reserved for the court both upon the law and the fact.

Hugh Hill, in last Easter Term, obtained a rule to show cause why the verdict should not be entered for the defendant pursuant to the leave reserved.

Temple and *W. S. Cross* now showed cause. There was no reasonable ground for arresting or detaining the plaintiff. He had not been directly charged with felony by Johnson. A constable is not justified in arresting a person upon a charge which is not reasonable. The instructions issued to police constables are, that "the constable must arrest any one whom he sees in the act of committing a felony, or one whom another positively charges with having committed a felony, or whom another sus-

pects of having committed a felony, *if the suspicion appear to the constable to be well founded*, and providing the person so suspecting go with the constable." In *McCloughan v. Clayton*, Holt, N. P. C. 478, Bayley, J., held that the constable was not bound in all events to take the alleged offender before a magistrate. He said: "If a felony be committed in the presence of the constable, he is bound to act; so, if a charge of felony be made with reasonable circumstances, it is his duty to act." *Isaacs v. Brand*, 2 Stark. Rep. 167, is a strong authority that the charge must be a reasonable one. In *Samuel v. Payne*, 1 Doug. 359, it was taken for granted that the charge was reasonable. In *Hedges v. Chapman*, 2 Bing. 523, Best, C. J., did not advert to the reasonableness of the charge, but the mode in which the question arose rendered it unnecessary for him to do so. When an innocent person has been arrested by a constable, the question is whether the circumstances made it reasonable that the constable should arrest him at the time when the arrest was made. In the present case, the facts that the plaintiff was a householder, and that his residence was known to the constable, afford strong evidence that the arrest was not reasonable.

Hugh Hill and *Perronet Thompson*, in support of the rule. A constable is justified in arresting if a charge be made *bona fide* and not collusively; that is, if the constable does not make himself a party to the wrong. The charge must be taken to be reasonable if the constable had no means of knowing that it was not true. In *Samuel v. Payne*, 1 Doug. 359, Lord Mansfield said: "If a man charges another with felony, it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment on the truth of the charge." [POLLOCK, C. B. In a note by Mr. Chitty, in *Blackstone's Commentaries*, vol. 1, p. 292, it is said, "A constable may justify an imprisonment without warrant, on a reasonable charge of felony made to him, though he afterwards discharge the prisoner without taking him before a magistrate."] In *White v. Taylor*, 4 Esp. 80, Le Blanc, J., held that the constable may, "if he please, exercise his own judgment on a charge made before him; but if the plaintiff cannot make out such a case as amounts to collusion, or that makes the constable a party to the wrong, if a regular charge be made before him, he is warranted in committing the party charged." In *Hobbs v. Branscomb*, 3 Camp. 420, the fact

of a charge having been made was held a sufficient justification to the constable. The charge in the present case was made under circumstances not inconsistent with its truth. [BRAMWELL, B., referred to Hale's Pleas of the Crown, p. 93.] In the case of a constable, the charge constitutes reasonable and probable cause; and, moreover, in this case, there was evidence of reasonable and probable cause. The fact of non-recent possession is no ground of discharge. A constable may act on a reasonable charge; or he may act on circumstances within his own knowledge, or on the information of others, but, in the two latter cases, there must be reasonable and probable cause. When a charge is made, the constable acts ministerially, and it is no part of his duty to inquire into the merits of the case. [POLLOCK, C. B. If, upon a reasonable charge of felony, or other crime for which a constable may arrest without warrant, the constable refuse to arrest or make hue-and-cry, he may be indicted and fined. Burn's Justice, vol. 1, p. 275 (29th ed.).] If the circumstances afford reasonable ground of suspicion that the party charged has committed a felony, the constable is justified in arresting him: *Davis v. Russell*, 5 Bing. 354; and if, in resisting, the constable is killed, he would be guilty of murder: *Rex v. Ford*, Russ. & Ry. 329; *Rex v. Woolmar*, Moo. C. C. 384.

POLLOCK, C. B. We are all of opinion that the rule must be discharged. I abstain from expressing any opinion, except what is necessary for disposing of this particular case. The general law and authorities have established that, in order to justify an arrest, there must be a reasonable charge. Whether that is to be decided by the judge as a matter of law, or by the jury as a matter of fact, is not important on the present occasion, because it was expressly reserved for the court to decide. It appears to me in this case there was not a reasonable charge, and that the verdict for the plaintiff ought to stand.

MARTIN, B. I am of the same opinion. The law is correctly laid down in Burn's Justice, vol. 1, p. 273 (29th ed.), where it is said that a constable may "apprehend a supposed offender for a felony without warrant upon a reasonable charge made by a third party, and this although, upon investigating the charge, it turn out that no felony has been committed. But there must in all cases exist a reasonable charge and suspicion." Therefore the constable is bound to ascertain whether the charge is reason-

able. I am of opinion that the charge in this case was not reasonable. The traces, which were on the plaintiff's horse, were alleged to have been stolen. The plaintiff was not present at the time the charge was first made, but, on being sent for, he came and gave an account of how he came possessed of the traces; but, in defiance of that, the defendant arrested and imprisoned him. Looking at all the circumstances, I cannot think that the charge was reasonable, or that there was any real suspicion that the plaintiff had stolen the traces.

BRAMWELL, B. I am of the same opinion. The law is correctly laid down in Burn's Justice. It is not every idle and unreasonable charge which will justify an arrest, but there must be a charge not unreasonable. The Metropolitan Police Act, 2 & 3 Vict. c. 47, § 64, authorizes "any constable belonging to the metropolitan police to take into custody, without a warrant, all persons whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace." This does not say that any charge is enough, but by implication says only such a charge as gives the constable *good cause* to suspect the person charged. If a person comes to a constable and says of another *simpliciter*, "I charge this man with felony," that is a reasonable ground, and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but he is responsible for so doing. Here the question is, whether the charge was not unreasonable. In my opinion it was a charge most unreasonable. I agree with Mr. Thompson that the case must be treated as if it were a case of recent possession; but then the other circumstances must be looked at. The plaintiff used the traces in the most open manner; and, when asked, he told how he got possession of them, and, moreover, the person who claimed them was a person not unlikely to have lost them.

WATSON, B. I am of the same opinion. There is no doubt about the law on the subject. So far as my experience goes, it always has been laid down by the judges and in the text-books that a constable may arrest without warrant where there is a reasonable charge of felony. The question here is, whether there was a reasonable charge. I think there was not. The argument as to reasonable and probable cause has no appli-

cation: the question is, whether a reasonable charge was made. Now, every case must be governed by its own circumstances, and the charge must be reasonable as regards the subject-matter and the person making it. If an idiot made a charge, the constable ought not to take the person so charged into custody. In *Isaacs v. Brand*, 2 Stark. N. P. 167, Lord Ellenborough said that the declaration of the thief did not justify a constable in taking a person into custody upon a charge of receiving the stolen goods. I have attentively considered whether the charge in this case was reasonable, because it is of the utmost importance that the police throughout the whole country should be supported in the execution of their duty, — indeed, it is absolutely essential for the prevention of crime; on the other hand, it is equally important that persons should not be arrested and brought before magistrates upon frivolous or untenable charges. Whether the question of reasonable charge is a matter of law for the judge, or a matter of fact for the jury, I do not express an opinion, as that was left to us, and I come to the conclusion that this was not a reasonable charge. It is not necessary to repeat the facts, but, taking them strongly in the defendant's favor, I think that this was not a reasonable charge, and that the defendant acted contrary to his duty and contrary to law in arresting the plaintiff.

Rule discharged.

TIMOTHY v. SIMPSON.

(1 Crompt., M. & R. 767. Exchequer, England, Hilary Term, 1835.)

Warrant. Felony. Arrest by Private Citizen. Trespass for assault and false imprisonment, and taking the plaintiff to a police-station. Plea, that the defendant was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill-treated the defendant and his servants in the dwelling-house, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and to depart from and out of the house; which the plaintiff refused to do, and continued in the house, making the said disturbance and affray therein; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff, for the cause aforesaid, and took him into custody.

It appeared in evidence that the plaintiff entered the defendant's shop to purchase an

article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing on request to go out of the shop, the shopman endeavored to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly; but he refusing to do so, the defendant gave him in charge of a policeman, who took him to a station-house. *Held*, first, that the defendant was justified, under the circumstances, in giving the plaintiff in charge of a policeman, for the purpose of preventing a renewal of the affray. *Held*, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself was not proved.

TRESPASS for assaulting the plaintiff, and taking him to a police station-house. Pleas: first, not guilty; secondly, that the defendant was possessed of a dwelling-house in the city of London, and that the plaintiff entered and came into the said house and made a great disturbance and affray therein, and insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and disquieted them in their possession thereof, against the king's peace; whereupon the defendant requested the plaintiff to cease his disturbance and depart from the said house, which the defendant refused to do, and continued in the said house making the said disturbance and affray therein; whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a policeman to take the plaintiff into custody, to be dealt with according to law. The plea then alleged that the policeman took the plaintiff into custody, and conducted him out of the said house to the police-station for examination, and to be dealt with according to law.

To this there was the general replication, *de injuria*.

At the trial before Parke, B., at the London sittings after last Trinity Term, the plaintiff obtained a verdict on the general issue, with 15*l.* damages; but the jury found a verdict for the defendant on the issue upon the special plea, the learned judge giving the plaintiff leave to move to enter a verdict for him, if the court should be of opinion that the facts proved in evidence did not support that plea. *Thesiger* having, in Michaelmas Term last, obtained a rule accordingly, or for judgment *non obstante veredicto*,

Bompas, Serjt., showed cause; and *Thesiger* was heard in support of the rule in the same term; and the court took time to consider. But the facts of the case and the arguments are so

fully stated in the judgment of the court, that it has been thought unnecessary to state them here. *Cur. adv. vult.*

PARKE, B., now delivered the judgment of the court. This was an action of trespass and false imprisonment, tried before me at the sittings after Trinity Term last, at Guildhall. The declaration was for an assault and false imprisonment, to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of *de injuria sua propria absque tali causa*. On the trial, the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him on the special plea, if the court should be of opinion that it was not substantially proved. A rule *nisi* having been obtained to enter a verdict for the plaintiff, or judgment *non obstante veredicto*, the case was fully argued before my brothers Bolland, Alderson, Gurney, and myself last term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a *stet processus*.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and, seeing an article in the window with a ticket apparently attached to it denoting a low price, sent his companion in to buy it; the shopman refused, and demanded a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it "an imposition." Some of the shopmen desired him to go out of the shop, in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen really supposing, or pretending to suppose, this to be a chal-

lunge to fight, stepped out and struck the plaintiff in the face, near the shop-door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on; many persons were there, and others about the street-door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen, and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the mean time, the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped.

Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman. That led to a conflict in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police-officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police-officer having, by the stat. 10 Geo. 4, c. 44, § 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge

to a constable who has not, and such constable may thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest, in order himself to take sureties of the peace, for he cannot administer an oath: *Sharrock v. Hannemer*, Cro. Eliz. 376; *Owen*, 105, s. c. *nomine*, *Scarrey v. Tanner*; but whether he has that power, in order to take before a magistrate, that *he* may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power. 2 Hale's Pleas of the Crown, 89. And the same rule has been laid down at *nisi prius* by Lord Mansfield, in a case referred to in 2 East's Pleas of the Crown, 306; and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Campb. N. P. C. 421. On the other hand, there is a *dictum* to the contrary in Brooke's Abr. Faux Impt. 6, which is referred to and adopted by Lord Coke, in 2 Inst. 52. Lord Holt, in *The Queen v. Tooley*, 2 Ld. Raym. 1801, expresses the same opinion. Lord Chief Justice Eyre, in the case of *Coupey v. Henley*, 1 Esp. 540, does the same. And many of the modern text-books state that to be the law: Burn's Justice (26th ed.), Arrest, 258; Bacon's Abr. D. Trespass, 53; 2 East's Pleas of the Crown, 506; Hawkins's Pleas of the Crown, book 2, c. 13, § 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray. It is unquestionable that any by-stander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. Lambard, in

his Eirenarcha, c. 3, p. 130, says: "Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt; for then may any man carry the other to the jail till it be known whether he, so hurt, will live or die, as appeareth by the stat. 3 Hen. 7, c. 1." In Hawk. P. C. book 1, c. 63, § 11, it is said, that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice Buller, are to be found in 9 Went. Plead. 344, 345; and De Grey, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and, *during the affray*, the constable may not merely on his own view, but *on the information and complaint of another*, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Lord Hale, P. C. vol. 2, p. 89. The defendant, therefore, had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police-officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now, at the time the defendant interfered, he was ignorant of that fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake

of securing the peace of his house and neighborhood, and the persons of all those concerned, from violence ; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as upon a review of all the circumstances he might think fit. If no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the by-standers acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor, indeed, of peace officers, whose power of interposition on their own view appears not to differ from that of any of the king's other subjects. For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police-officer.

This brings me to the second question, whether the plea upon the record was substantially proved. I thought upon the trial that it was ; but, upon further consideration, I concur with the rest of the court in thinking that it was not. The plea was as follows : " And the defendant says, that before and at the said time when, &c., the said defendant was lawfully possessed of a certain dwelling-house in the city of London ; and the said defendant being so possessed thereof, the said plaintiff just before the said time when, &c., entered and came into the said dwelling-house, and then and there, with force and arms, made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the king ; whereupon the defendant then and there requested the plaintiff to cease his noise and disturbance, and to depart from and out of the said house, which the plaintiff then and there wholly refused to do, and continued in the said house, making the said noise, disturbance, and affray therein ; whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a certain policeman of the city of London, and then and there requested the said policeman to take the plaintiff into his custody, to be dealt with

according to law ; and the said policeman, so being such policeman as aforesaid, at such request of the defendant, then and there gently laid his hands on the plaintiff for the cause aforesaid, and did then and there take the plaintiff into his custody." The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove *all*. It is enough to establish so many of them as would justify the arrest. It is not enough to prove facts which justify the imprisonment: it is necessary to prove such of the facts *alleged* as would do so. The allegations which were proved were the entry into the defendant's house, the assault on his servants, the disturbance of the defendant in his possession of the house, by an affray in it, in which the plaintiff bore a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge in order to preserve the public peace ; but the fact of an assault on the plaintiff himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence ; for in none of the other alleged facts is the defendant's presence inserted or necessarily implied before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling-house might have occurred by an entry in his absence, and therefore that averment does not by necessary implication affect the defendant's presence. If so, the substance of this plea, that is, so many of the allegations in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved. For this reason we think that the proof failed ; but, as this is a case in which an amendment would have been allowed by virtue of the last statute, as it is clear upon the facts that there was a defence, on the ground of the defendant's right to arrest for a breach of the peace in his presence ; and as the declaration of my opinion, that the plea was substantially proved at the time, probably prevented an application to amend, — we think that there should be a new trial, when, or before which, the plea may be amended. And as ultimately there will be a verdict for the defendant, if the same evidence is adduced, the best course will be for the parties to agree to enter a *stet processus*.

Rule accordingly.

ALLEN v. WRIGHT.

(8 Car. & P. 522. Common Pleas, *Nisi Prius*, England, Trinity Term, 1838.)

Warrant. Felony. Suspicion. In an action for false imprisonment, the defendant justified on the ground that the plaintiff had been his lodger, and after she had left her apartments, he discovered that some feathers were missing from a bed which she had occupied, and he, suspecting her to be the person who had stolen them, caused her to be apprehended, &c. It appeared that the defendant took a policeman at night to the new lodgings of the plaintiff, a few days after she had left his house, and had her apprehended and taken to the station-house, and the next day she was examined before the magistrate and discharged. *Held*, that as the defendant had taken the law into his own hands, and not adopted, as a prudent person would, under such circumstances, the cautious course of having a previous investigation by a magistrate, and obtaining a warrant from him, it was incumbent on him to make out to the entire satisfaction of the jury not only that a felony had been committed, but that the circumstances of the case were such that they or any reasonable person, acting without passion or prejudice, would fairly have suspected the plaintiff of being the person who had committed it.

THE declaration stated that the defendant, on the 19th of March, 1838, assaulted the plaintiff, and forced and compelled her to go into the public street, and through several lanes, &c., to the police station-house in Tower Street, Lambeth, and there imprisoned and kept her, without any reasonable or probable cause, for twenty hours, contrary to law and against her will; and that on the 20th of March he again assaulted her, and compelled her to go from the station-house to Union Hall Police Office, and there kept and detained her for six hours, whereby she was not only hurt and injured in her body and mind, but also exposed and injured in her credit and circumstances. The defendant pleaded, first, not guilty; and, secondly, a special plea, to the following effect: that the plaintiff was a lodger in the defendant's house, and was supplied with a feather-bed, which, during a portion of the time, was made by the plaintiff and a servant of the defendant; that the plaintiff, while she was such lodger, demeaned herself in an improper, irregular, and disreputable manner, and particularly in receiving the visits of and cohabiting with one G. D., and that, after a certain time, she refused to allow the servant to assist in making the bed, and always locked the door of the room when she went out. It then averred that while the plaintiff continued as lodger, as aforesaid,

seventy pounds weight of feathers were stolen from the bed; and that the defendant having good and probable cause of suspicion, and vehemently suspecting the plaintiff to be the person who stole them, caused her to be apprehended, &c.

From the evidence on the part of the plaintiff, it appeared that she resided for some time in the house of the defendant with a gentleman named Davison, who passed with her by the name of Gordon. They left in the evening of Friday, the 16th of March, between six and seven o'clock; and, after they were gone, that same evening a friend of the gentleman paid the defendant for him several claims for damage to furniture, &c., and at that time nothing was said about any loss of feathers from the bed. On the evening of Monday, the 19th of March, about ten o'clock, the defendant and his wife were observed by a policeman on duty watching the house No. 12 in the Waterloo Road. The defendant addressed the policeman, and told him he wished to ascertain whether a young woman named Gordon was living there. The policeman inquired what he wanted her for, and was told of the damage sustained, which had been paid for, and also that there was a large quantity of feathers missing out of the bed. The policeman knocked at the door and gained admittance to the house, together with the defendant. The plaintiff inquired who wanted her, and on being told, said she could not see Mr. Wright that night. It was then about twenty minutes past ten. The policeman and Mr. Wright followed the servant upstairs. They saw the plaintiff, and the policeman asked the defendant if that was the person. He said yes, it was, and then charged her with stealing the feathers out of the bed in his house while she was lodging there. The policeman told her that she must go with him to the station-house. She at first objected, but afterwards went, and the defendant made his charge to the inspector, and she was locked up in a cell, where she remained till between ten and eleven the next morning. A duplicate for a bed was found upon her. After the plaintiff had been locked up, the policeman went back with the defendant's wife to the plaintiff's lodgings, but nothing belonging to the defendant was found there. The plaintiff was taken on the next day before Mr. Trail, at Union Hall, who discharged her. The defendant wished him to remand her, but he would not.

It was also proved that the gentleman with whom the plaintiff lived supplied her with adequate means of support; and a witness stated that he had examined the bed, and found it to be a very old one, and expressed it as his opinion that the quantity of feathers in it was sufficient for its size.

Stammers, for the defendant. The plaintiff has been charged with felony upon just ground of suspicion. The defendant undertakes to prove, not that she actually committed the offence, but that she was arrested under such circumstances of suspicion as justified the examination before the magistrate. The question is, did the plaintiff place herself in such a situation of suspicion as to justify the defendant in taking her before the magistrate? and the disputes between the defendant and Mr. Davison had nothing to do with the matter. The plaintiff's leaving her lodgings before the expiration of the notice to quit, and between six and seven in the evening, was calculated to excite suspicion. The finding of the duplicate on her was also a circumstance of suspicion. It will be injurious to society if you allow it to go forth to the world that a tradesman who has lost his property, and causes an investigation to take place before a magistrate, shall be held to be dragged into court by the paramour of the party charged.

On the part of the defendant, his servant was called as a witness, and said, that for about three weeks after July, 1837, when she went to live at the defendant's, she assisted the plaintiff in making her bed; that it was quite a full bed, and the plaintiff used to call her up and tell her that one person could not make it properly; that during the three weeks when the plaintiff went out, she used to leave the door of the room open, but afterwards she used to lock it, and go out with bundles under her arm, and refused to allow her to help her in making the bed; that she saw the bed the next morning after the plaintiff left, and found it half empty.

An upholsterer also proved that he examined the bed, and found about one-half of the feathers deficient.

Wilde, Serjt., in reply. The plaintiff had no motive to induce her to steal the feathers; she had her wants supplied by Mr. Davison. If the defendant had any *bona fide* charge of felony, would he not have applied for a warrant? But he knew he

could not get a warrant, and his object was to gratify his malice ; and so he went at night and took her from her own house and lodged her in the station-house.

TINDAL, C. J., after stating the complaint in the declaration and the defendant's answer to it, said : That is an answer which it is incumbent on him to make out to your satisfaction, because he has taken the law into his own hands, by not acting as any prudent person would have done, viz., going before a magistrate and taking out a warrant. At all events, the defendant acted in a very indiscreet manner (as there was no reason to conclude that the plaintiff had any intention to abscond) in not taking the usual and cautious step of having the case investigated by a magistrate before imprisoning the party. The only two points upon which you must be satisfied before you can find a verdict for the defendant are, 1st, that a felony had actually been committed ; that some person or other had stolen, according to the evidence, about half the feathers from the bed ; and 2d, that the circumstances were such that you yourselves, or any reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it. If you think the circumstances were such, you will find your verdict for the defendant ; if you do not, you will find your verdict for the plaintiff, and give her such reasonable damages as you think she is entitled to.

Verdict for the plaintiff. Damages, 5*l*.

Historical.—The earliest mention of actions for imprisonment, as in the case of assault and battery, is found in Bracton, and in the same connection with that subject. Chapter 25 of Bracton's 3d Book (p. 145) is entitled *De appello de pace et imprisonmento*. The criminal aspect of the injury seems to have been of more importance than the civil, as was the case with assault and battery. Bracton gives the form of the criminal appeal and passes over the civil remedy by stating that this might be had by omitting the charge of felony from the former. The appeal was as follows: "A. appellat B. quod sicut fuit in pace domini regis, etc., venit idem B. cum vi sua contra pacem, etc., et duxit eum ad talem curiam, vel ad talem locum et ibi eum posuit in vinculis, et in ferro, et in cippo, et in prisona ibi eum tenuit per tantum tempus, et plagas ei fecit et mahemium, donec deliberatus fuit per ballium domini regis, vel donec tantum ei dedit pro redemptione sua, et quod hoc fecit nequiter [et in felonia] offert probare per corpus suum, vel alio modo, sicut curia domini regis consideraret." The defendant pleaded thus: "Et B. venit et defendit vim et injuriam, et pacem domini regis infractam, et captionem,

et imprisonamentum, et detentionem in priona, et redemptionem tot solidorum, plagam et mahemium, et quicquid ei imponitur, secundum quod ei imponitur per corpus suum, vel alio modo, secundum quod curia domini regis considerat." Bracton, 145 b.

Bracton says that the defendant might be doubly guilty; in one way by an unjust taking, and in another by an unjust detention, both of which acts, it will be noticed, are alleged and denied in the above appeal and plea. And he defines imprisonment to be where a freeman has been taken and imprisoned *contra pacem*, in a court or within the liberty of any one, or has been shut up in a house or castle, in a city, ville, or burgh, and detained in iron, chains, or the stocks, *contra pacem*, until he has been liberated by a servant of the king, or by the king's writ. *Ib.*

In the Mirror the appeal is given thus: "Darling here appealeth, Wiloc there, for that whereas the said Darling, &c., the said Wiloc came and arrested the said Darling, and brought him to such a place, or at such a day, and put him into the stocks, or in irons, or in other pain or inclosure, from such a day until such a day, &c.; or thus, contrary to sufficient bail offered by him, in a case bailable, detained him, or after judgment given for his deliverance, from such a day to such a day. This felony he did feloniously." Ch. 2, § 18.

It was a good plea to the appeal that the appellor was the slave and villain of the appellee: Bracton, *ut supra*; or the defendant might say that he did the act complained of by force of a rightful judgment of such a judge. But to this plea, as is above indicated, it was a good replication that after there came a warrant to deliver the

appellor, the appellee kept him in prison for the time named in the appeal. Mirror, c. 3, § 22.

Whether a false imprisonment could be civilly redressed in trespass at the time of Bracton does not appear, but in the following reign, while the remedy by appeal still remained, that by trespass was advised as preferable. 1 Nichols's Britton, 123; note on Assault and Battery, *ante*, p. 222.

In the Register there are many writs of trespass for assault and battery and false imprisonment, much in the form of the modern declaration; the writs running thus: "The king to the sheriff, greeting. If A. shall make you secure, &c., then put B. in pledges, &c., to show why with force and arms he took the said A. and beat, wounded, and imprisoned, and ill-treated him, and detained him in prison until he made such a fine of lands, or paid such a ransom, &c., and other enormous things committed," &c. See Register, Original Writs, 93, 95 b, 96, 99, 99 b, 102, 106, 108, 109; Fitzh. N. B. 86 K. The gist of the action, then as now, was the imprisonment, and the other acts were only aggravation. Fitzh. N. B. 86 K.

Thus far we have no mention of any thing but an actual imprisonment within physical boundaries. The first mention we find of any other kind of imprisonment appears in a note in a case in the Liber Ass. 22 Edw. 3, p. 104, pl. 85, where Thorpe, C. J., says, that imprisonment occurs in any case where a man is arrested by force and against his will, though it be in a highway or elsewhere, and not within walls.

In Pulton De Pace Regis, 10 b (ed. 1615), the term is thus defined and commented upon: "Imprisonment

is where a man is arrested by force and against his will, and is restrained of his liberty, and put in a common jail or other jail, in a cage, or in the stocks, or otherwise kept in the *high street or open field*, if he be in restraint and cannot go at liberty when he will, but is bound to become obedient to the will of the law, and is in the custody of the law. And in all the cases aforesaid the party so restrained is said to be a prisoner so long as he hath not his liberty freely to go at all times when he will, without bail, mainprise, or other restraint. And, therefore, if one person do arrest, imprison, or otherwise restrain another person of that liberty, without sufficient and lawful cause, the party grieved may have an action of false imprisonment, or an action of trespass [i.e., it would seem, for the assault and battery] against him that doth so arrest or imprison him, and recover damages against him. And the king shall also have a fine of him, for that his law is contemned, and his peace broken, in that one of his subjects presumeth to imprison another without sufficient warrant of him or his law."

A man's previous consent could not take away his right of action for an illegal imprisonment; for, says Pulton, p. 11, the liberty or imprisonment of a man's body resteth in the censure and judgment of the law, and not in his own disposition. "As if B. do promise C., or be bound by obligation unto him, that if he do not pay unto the same C. a sum of money within six months, then C. shall take and imprison him until he hath paid it; notwithstanding B. do not pay to C. the money at the time assessed, C. may not imprison B. for it, though it was his own promise, agreement, or bond; for that B. is not judged by his peers, or

condemned by the law of the land, according to the statute of *Magna Charta*."

It was at this time, as it is now, a justification that the defendant was assisting an officer in making an arrest for which the latter had a lawful precept (19 Hen. 6, pp. 43, 56); "for any stranger may assist a sheriff, his bailiffs, or any other that hath authority to execute the king's writs or process, and he that will not assist him, being required, shall pay a fine to the king. And the sheriff may take as many persons as he will to aid him to execute the king's writs; for it is in furtherance of justice, and no breach of the peace." Pulton, p. 12 b.

If the sheriff arrested a man under a *capias*, and did not return his writ, the party arrested could maintain an action against the sheriff, and recover as for a wrongful arrest or imprisonment. But if the sheriff's bailiff arrested a man, and the sheriff did not return the writ, no action could be maintained against the bailiff; "for the sheriff's offence shall not prejudice the bailiff, and the bailiff cannot compel the sheriff to return the writ." Ib. A sheriff or bailiff who was known, might make an arrest without showing his warrant. Ib. p. 13.

The law as to arrests on suspicion was at this time much the same as it is now. Pulton (p. 13), on the authority of the cases, 7 Hen. 4, p. 35, and 27 Hen. 8, p. 23, says that in an action for a false imprisonment it is no plea for the defendant to say that it was told him that the plaintiff had brought cattle to the town, and put them in a blind corner, and that there was great cause of suspicion that the plaintiff had stolen them, whereupon he did arrest him; "for suspicion only, without

a felony committed, is no cause to arrest another." But if a felony had been committed in the neighborhood, and a particular person were suspected of committing the offence, he might be lawfully arrested; "for," says Pulton, "a justice of the peace cannot arrest another of suspicion of felony unless he himself doth suspect him to have committed felony; and so much another may do that doth suspect another to have committed felony, viz., if he himself doth suspect him to have committed the felony." (As to the present law upon this point, see *infra*.)

Accordingly, where a felony had been committed, the common voice and fame of the country, pointing to a particular person as the offender, could be set up in defence to an action by such person. *Ib.*; 2 Hen. 7, p. 15; 5 Hen. 7, p. 4; 11 Edw. 4, p. 4; 7 Edw. 4, p. 10; Dyer, 236.

It was a good justification to a sheriff that the imprisonment had been made under a warrant from a justice of the peace, provided there had been an indictment; otherwise not. But even in the latter case a *bailiff* was safe in serving the warrant. "And the same law is, if the sheriff doth err in any warrant that he doth direct to the bailiff of a liberty." Pulton, p. 13 *b*.

The defendant was also allowed to show that he knew that the plaintiff had committed a felony, and had accordingly arrested him and delivered him to a constable to be taken to jail; and it was not a good reply that the latter had set the plaintiff at liberty, or that he had been rescued out of the possession of the constable. *Ib.*; 14 Edw. 4, p. 17.

A sheriff could not arrest by virtue of the then common writ of *justicies*,

since that writ simply gave him jurisdiction to try causes. Nor could the sheriff make a valid *capias* while sitting under a writ of *justicies*; the writ of arrest must have come from a court of record. *Ib.* p. 14; 2 Hen. 4, p. 24.

"By which foresaid cases, and many more," says Pulton (14 *b*), "it appeareth that imprisonment is lawful, and sufficiently authorized by the common laws and statutes of this realm in divers respects, and for many crimes, and there is by it no breach of the peace, nor offence to the law when it is inflicted by the warrant of the law.

. . . But the imprisonment which tendeth to the breach of the peace and the offence of the law is when one person or more, upon his or their own authority, either in revenge of some supposed wrong received, or in hope of a private gain expected, or for some other cause, will of his or their own authority imprison or arrest another; for the redress thereof the party aggrieved shall have an action of false imprisonment, or an action of trespass, and recover his damages. And the same offender which before did wrongfully imprison another shall then, upon his conviction by verdict, or his own confession, be himself lawfully imprisoned until he hath paid to the king a fine."

In the same connection it is stated that the law notes four classes of persons as "worthy for their offences to be imprisoned." The first were those who committed acts that were "wrongful, injurious, and prohibited by the common laws or statutes of the realm." The second were those who attempted and prosecuted unjust and wrongful actions to molest, trouble, or charge others. The third were those who, being pleaded upon just and good causes, pleaded "false or dilatory

pleas, in retardation of justice and hindrance of the due and ordinary course of the law." The fourth were those "who upon stubbornness, contumacy, or wilfulness, refuse to do that which they know the law doth require at their hands, and may enforce them unto." Among cases of the first class is mentioned the case of a man entering by disseizin contrary to his lease. 27 Hen. 6, p. 8. Of those of the second is mentioned the case of one who brought an appeal against another which was abated by the nonsuit of the plaintiff; as where a woman brought an appeal against a man of the death of her husband, and her said husband was brought into court, and she was examined if that were her husband, and she said yes, but she supposed that he was dead, whereupon she was imprisoned. 8 Hen. 4, p. 18. Of cases of the third class an example is given of a man denying his own deed, or pleading a false deed made to himself, or a deed that was "rased," interlined, or was otherwise suspicious. So of a false plea of joint tenancy, or of failing to show a record pleaded. Of the fourth class was the case of a tenant owing homage or fealty, and refusing to do the same or to plead in bar thereof; and so of one who refused to perform the ordinary's sentence.

From all of this it appears that though the law was in some respects peculiarly jealous of the liberty of its free subjects, it also imposed upon them many duties and restraints of a most oppressive character, the infraction of which was good ground for imprisonment. But it is to be observed that in the above cases the defendant in the action for imprisonment must have justified as an officer of the law (or an assistant of one), acting under its pre-

cept. As appears from Pulton, in the quotation *supra*, p. 271, it was not lawful for the injured party to take the law into his own hands and seek amends by imposing restraint upon the liberty of the offender. We now turn to the modern law.

The Arrest. — False imprisonment is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without legal authority. Every confinement of the person is an imprisonment, whether it be in a common prison, or a private house, or by forcibly detaining one in the public streets. 3 Black. Com. 127; Addison, Torts, 575 (4th ed.); Buller, N. P. 22.

Actual contact is not necessary to constitute an imprisonment. *Brushaben v. Hegeman*, 22 Mich. 266; *Grainger v. Hill*, *ante*, p. 184. Any general restraint put upon the freedom of another by show of authority or by force, is sufficient; so that, if a person be restrained from leaving a room, or from going out of a house, without the presence of a constable, this is an imprisonment. *Ib.*; *Warner v. Riddiford*, 4 Com. B. N. s. 180.

It is difficult to ascertain just where the line lies. In *Warner v. Riddiford*, just cited, an instruction to the jury to this effect was held substantially correct: To constitute an imprisonment, it was not necessary that the person should be locked up within four walls; if he was restrained in his freedom of action by another, that was an imprisonment. The way in which the plaintiff had been constrained in his own house, and the restraint put upon his person by refusing him permission to leave the room and go upstairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate.

In this case the doctrine of *Arrow-smith v. Le Mesurier*, 2 Bos. & P. N. R. 211, is denied. It appeared in that case that a warrant having been granted by a magistrate for apprehending the plaintiff upon a charge of conspiracy to sue out a fraudulent commission of bankrupt, a constable went with the warrant to the plaintiff's house and showed it to him; that after conversing some time with the constable, the plaintiff desired to have a copy of the warrant, which the constable permitted him to take, after which the plaintiff attended the constable to the magistrate, and, after being examined upon the subject of the charge, was dismissed, only about six hours having elapsed since the warrant was first shown to him, and the constable not having touched him. A verdict having been found for the defendant, Mansfield, C. J., in discharging a rule for a new trial, said: "I can suppose that an arrest may take place without an actual touch, as if a man be locked up in a room; but here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested?"

Mr. Justice Willes, in the case above referred to, *Warner v. Riddiford*, says that the law was stated more accurately by the court in *Grainger v. Hill*, 4 Bing. N. C. 212. In this case the facts in brief, as stated by Mr. Justice Willes, were, that the plaintiff had mortgaged to the defendants a vessel, of which he was owner and captain. The money was to be repaid within a year; and the plaintiff in the mean time was to retain the register of the vessel, in order to pursue his voyages. About two months after the mortgage was

given, the defendants, fearing for the sufficiency of the security, resolved to possess themselves of the ship's register; and for this purpose, after threatening to arrest the plaintiff unless he repaid the sum loaned, made an affidavit of debt, sued out a *capias*, and sent officers with the writ to the plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present seeing that he could not be removed, one of the defendants said to the officers, "Don't take him away; leave the young man with him." The officers then told the plaintiff that they had not come to take him, but to get the ship's register; but if he failed to deliver that, or to find bail, they must either take him or leave one of the officers with him. The plaintiff, being unable to procure bail, and being much alarmed, gave up the register; and the court held that this amounted to an arrest. Tindal, C. J., said: "Without actual contact, the officer's insisting that the plaintiff should produce the register, or find bail, shows that the plaintiff was in a situation in which bail was to be procured; that was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's *Nisi Prius*, p. 62, goes the full length. 'If the bailiff who has a process against one says to him, when he is on horseback or in a coach, "You are my prisoner; I have a writ against you," upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process.' " Mr. Justice Willes then proceeds to say of the case before the court, "In the present case, if the door of the room had been locked, nobody could doubt that that would have been an imprisonment. The defendant coming to the house with two officers, the

plaintiff being there, and submitting to their control, it was the same as if he had actually been locked up in the room. That being the proper view of the facts, the judge observes that 'the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person by refusing him permission to leave the room and go upstairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate.' I think the judge must be considered as having here adopted the view of the case taken by the defendant's advocate; and though it would have been more correct to have told the jury that, if the substance of the transaction was that the plaintiff was restrained from leaving the room without permission, or without the attendance of the constable, it amounted to an imprisonment, yet, giving a fair and reasonable construction to the summing up, it seems to me that it is not open to exception. The judge does not profess to be laying down a principle, but rather to be discussing and explaining the law with reference to the facts of the case."

Upon the same point, Mr. Justice Baldwin says: "The submission to the threatened and reasonably to be apprehended force is no consent to the arrest, detention, or restraint of the freedom of his motions; he is as much imprisoned as if his person was touched, or force actually used. The imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease, and the means of effecting it are removed." *Johnson v. Tompkins*, Baldw. 691. See also *Bird v. Jones*, 7 Q. B. 742; *Wood v. Lane*, 6 Car. & P. 774.

But the plaintiff, it seems, must have

felt under a complete restraint of his freedom of action. In *Bird v. Jones*, 7 Q. B. 742, it appeared that part of a public highway was inclosed by a temporary fence, and appropriated for spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was so told, in the only other direction by which he could pass. This he refused for some time to do, and during that time remained where he had thus placed himself. No actual force or restraint on his person was used, unless the obstruction mentioned amounted to that. The court, Lord Denman, C. J., dissenting, held that there was no imprisonment. The majority of the court thought that unless the restraint was total, so that the plaintiff could not escape without a breach of the restraint, there was no imprisonment. Mr. Justice Coleridge said that the idea implied boundary. As to the statement in *Comyns's Digest*, Imprisonment, G, that "every restraint of the liberty of a free man will be imprisonment," he said that the object of the authorities upon which the statement was based (2 Inst. 482, and *Hobert and Stroud's Case*, Croke Car. 209) was to point out that a prison was not necessarily what is commonly so called, — a place locally defined and appointed for the reception of prisoners. Lord Denman, however, thought that the fact that

the plaintiff had liberty to go one way was not material. "As long," said he, "as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? . . . If I am locked in a room, am I not imprisoned because I might effect my escape through a window?" But the answer to this last query is, that such an escape would be a prison-breach, — that is, a breach of the restraint; while for the plaintiff to have departed by the way open to him would have been no breach. It would not have been an *escape* at all, for that implies hindrance.

The question seems to come to this, whether it is actionable to place a partial restraint upon the liberty of another; and it is hardly satisfactory to say that the notion of imprisonment itself implies a circumscribing restraint. The designation of the action was doubtless given from the fact that it was at first brought only for wrongful confinement within walls. But it is difficult to see how an action can be sustained for any thing less than a substantially total restraint of freedom. It cannot be because the plaintiff is put in terror when he knows that no resistance will be offered to his proceeding in *some* way; and if it is because his freedom of motion is sacred, the answer is that in society no man can enjoy perfect freedom of action. The movements of some are constantly being restrained against their will and to their discomfort, by the necessary movements of others; and though the restraint be purposely imposed, it cannot be ground for an action if the party complained of had a right to be where he was. If, for instance, a person should see one against whom he owed a grudge coming in the highway in a carriage, and between them there

was a mud-hole or dangerous place on the right-hand side (or in England on the left-hand side) of the approaching carriage, the former might drive his horse so as to cause a meeting at the spot, and compel the latter to turn aside at the troublesome place, however disagreeable and unnecessary it might have been.

It is not uncommon to join counts for malicious prosecution with those of this action; but there is an essential difference between the two injuries. In support of the counts for malicious prosecution the plaintiff must prove that the arrest was made maliciously, without reasonable and probable cause, and that the prosecution has terminated, and in his favor. But, as to the counts for false imprisonment, it is enough to allege and prove the assault and the imprisonment. The plaintiff has then made out a *prima facie* case, and it is for the defendant to excuse himself. We have stated the law as to assaults and imprisonments; it remains to present the defendant's justification; and this point will occupy the rest of the present note.

Arrests with Warrant. — It is, in general, a justification in this action that the imprisonment complained of was made *bona fide* under a legal warrant, upon the ground that the arrest was made under compulsion of law. In England this justification of the officer is made under the statute of 24 Geo. 2, c. 44. By the common law, an officer who executed the warrant of a magistrate was, it is said, answerable for the consequences in all cases, if the magistrate acted without authority; and one object of the legislature was to relieve him from that inconvenience, and to provide that, except in certain cases to be mentioned hereafter, if he acted

strictly in obedience to the warrant of the magistrate, he should be protected. See *Parton v. Williams*, 3 Barn. & Ald. 830. This statute, which was passed before the American Revolution, is, perhaps, in force in this country; at any rate, the cases founded upon it have been generally followed here. It is, indeed, worthy of note that the statute, as construed by the courts, only enunciated, in this particular, the doctrines of the celebrated case of the *Marshalsea*, 10 Coke, 68 b.

The officer, in executing his writ, must arrest the person named in the warrant; and if he do not, though the arrest of the plaintiff be a pure mistake, it is a case of false imprisonment. If, however, the person arrested caused the mistake by a false representation that he was the party intended, he cannot bring an action for false imprisonment, unless the officer detained him unnecessarily after the discovery that he had arrested the wrong person. *Dunston v. Paterson*, 2 Com. B. N. S. 495, was a case of this kind. If, indeed, the plaintiff has made contradictory statements, he may be detained long enough to ascertain the truth of the matter; and this on the ground that he has voluntarily misled the officer in making the arrest. *Volenti non fit injuria*. *Ib.* But the detention must be a reasonable one; for the general rule is that a warrant will not justify a subsequent detention. *Doyle v. Russell*, 30 Barb. 300. If the officer have reason for holding the prisoner after the original warrant has expired, he must procure a new writ. *Ib.*

And the officer's writ must so describe the person to be arrested that he may know whom to arrest, and that the party restrained of his freedom may know whether to resist or submit; and

it is no defence, in such case, that the person intended was arrested: *Miller v. Foley*, 28 Barb. 630; *Scott v. Ely*, 4 Wend. 555; unless he was known as well by the name given in the writ as by his real name: *Griswold v. Sedgwick*, 1 Wend. 126.

An officer may vitiate the protection of his warrant by oppression and cruelty, and render himself liable for false imprisonment. *Doyle v. Russell*, 30 Barb. 300. As, where he unites with the party who caused his arrest in extorting money from the plaintiff, by working upon his fears. *Holley v. Mix*, 3 Wend. 350.

A question has been raised of the right of the officer, in a criminal case, to retake, upon the original warrant, a prisoner whom he has allowed to escape. In civil cases, the rule is settled that he may thus retake the party if arrested upon mesne process, but not where he was arrested in execution. *Atkinson v. Matteson*, 2 T. R. 172; *Arnold v. Steeves*, 10 Wend. 514. The reason of the difference is that, in the latter case, if the prisoner escape by the voluntary permission of the officer, the plaintiff's debt is paid, and the sheriff is chargeable in his stead; so that, if he retake the party on the old writ, he is liable for false imprisonment. But, in the former case, the bailiff may suffer the prisoner to go at large, provided he has him at the return of the writ, for this is the only object of the writ. *Atkinson v. Matteson*, *supra*.

In criminal cases there has been some conflict as to the right to retake the prisoner without new process. In *Clark v. Cleveland*, 6 Hill, 344, it was held that the prisoner might be so retaken. In this case the prisoner was let to bail in the wrong county, and was re-

leased from custody; and, in case for malicious prosecution, it was held that the plaintiff was still liable to arrest under the original warrant, and that, therefore, the proceedings not being terminated, the action would not lie.

In a later decision this case was denied to be law, and said to be unsupported by the authorities cited for it. *Doyle v. Russell*, 30 Barb. 300, Hogeboom, J., dissenting. This was an action for false imprisonment, with counts for malicious prosecution. Gould, J., in delivering the judgment of the court, referred to *Hawkins*, who says: "If a constable, after he hath arrested the party by force of any warrant of a justice of the peace, suffer him to go at large, upon his promise to come again at such a time and find sureties, he cannot afterwards arrest him by force of the same warrant. However, if the party return, and put himself again under the custody of the constable, the constable may lawfully detain him." And this voluntary return was said to be the distinction upon which the cases cited in *Clark v. Cleveland* proceeded. The statement of the reporter in *Dickinson v. Brown*, 1 Esp. 218, was referred to, that "it appeared to be rather on the ground of the plaintiff's having consented that the warrant should remain in force until the second surety to the parish was perfected than as holding the second arrest under the warrant to be legal."

Where an arrest has been made on a valid writ, the sheriff may detain the person arrested on any number of valid writs which he has at the time against him, or which afterwards reach him; but if the sheriff make the arrest on a forged or a feigned writ, or a writ which has never been sealed, or a writ otherwise invalid, he has no right to

detain the party on any other valid writs which may at the time be in his hands, for the sheriff cannot avail himself of a custody brought about by illegal means to execute the other writs.

Thus, if an arrest be made on Sunday, or in a way not authorized by law, the officer cannot afterwards make that valid by detaining the person under a legal writ, but must first give him an opportunity to go at large, and then execute the legal writ. And, in general, if the first arrest be a false imprisonment, no subsequent conduct of the officer can make it otherwise, or legalize the continuance of the imprisonment. *Addison, Torts*, 658 (4th ed.); *Humphrey v. Mitchell*, 3 Scott, 51; *Hooper v. Lane*, 6 H. L. Cas. 443, 497; *Burratt v. Price*, 9 Bing. 566; *Pearson v. Yewens*, 5 Bing. N. C. 489; *Robinson v. Yewens*, 5 Mees. & W. 151; *Collins v. Yewens*, 10 Ad. & E. 570.

As to the much-discussed subject of the distinction between void and irregular or voidable process, it is commonly said that an arrest under void process is no justification to the officer; while an arrest under irregular, as well as under regular, process excuses him. And there is little or no conflict thus far; the difficulty, as is shown in *Savacool v. Boughton*, has been in applying or defining the terms "void" and "irregular."

When it is said that the officer is liable if the process under which the arrest was made is *void*, we understand the meaning to be that he is liable if his writ show upon its face that it is void. This may appear in either of three ways: 1. It may appear by defective language; as in *Carratt v. Morley*, 1 Q. B. 18. But there must, of course, be a material defect to vitiate the pro-

cess. In such cases the process may have issued in a proceeding within the jurisdiction of the court. 2. It may appear, in showing that the whole proceeding was beyond the jurisdiction of the court; as in *Pearce v. Atwood*, 13 Mass. 324, and in *Stephens v. Wilkins*, 6 Barr, 260. The officer is presumed to know, and is bound to ascertain, the extent of the jurisdiction of the court for which he acts; and if his writ issue from a proceeding beyond the general jurisdiction of the court, he acts at his peril in executing it. 3. It may appear in showing that the court had no power to issue a warrant in such a cause; as in *Shergold v. Holloway*, 2 Strange, 1002, where a justice issued a warrant on a complaint for not paying wages, when he should have issued a summons. In all of these cases the sheriff is liable at common law if he execute the writ.

When it is said that the officer is excused if the process is merely *irregular* or *voidable*, we understand the meaning to be, not an irregularity of form, since if there were a material defect of this kind the process would, as we have seen, be void, and any thing less than that would not affect it; the meaning is that the writ has been granted in an irregular manner, in a proceeding from which it might itself have been regularly issued; as in *Hill v. Bateman*, 2 Strange, 710. Cases of this kind are always within the general jurisdiction of the court; and the officer is not liable, since, though bound to know the extent of jurisdiction, he is not presumed to know the nature of all the proceedings in a cause.

The principal case, *Savacool v. Boughton*, has been often followed. *Lewis v. Palmer*, 6 Wend. 367; *Sheldon v. Van Buskirk*, 2 Comst. 473; *Chegaray v. Jenkins*, 5 N. Y. 376;

Kerr v. Mount, 28 N. Y. 659; *Porter v. Purdy*, 29 N. Y. 106; *Paton v. Westervelt*, 2 Duer, 362, 382.

The case of *The Marshalsea*, 10 Coke, 68 *b*, a venerable authority, supports most of the points above stated. It was there held that the court of the Marshalsea had no jurisdiction in *assumpsit* where neither the plaintiff nor the defendant was of the king's household; and that, in such case, if judgment had been obtained against the principal, and one of the bail was arrested by process from the Marshalsea, such bail might maintain an action for false imprisonment against the party who sued, the marshal who directed the execution of the process, and the officer who executed the same. One of the resolutions was, that when a court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, no action lies against the party who sues, or the officer or minister of the court who executes the process. But where the court has not jurisdiction of the cause, then the whole proceeding is *coram non judice*, and actions will lie against them without any regard to the precept or process. And the explanation given of this was that when the magistrate, having no jurisdiction, issued process, he was not a judge; and "it is not of necessity to obey him who is not a judge of the cause, no more than it is a mere stranger, for the rule is *judicium a non suo judice datum nullius est momenti*. . . . As if the Court of Common Pleas holds plea in an appeal of death, robbery, or any other appeal, and the defendant is attainted, it is *coram non judice, quod omnes concesserunt*. But if the Court of Common Pleas in a plea of debt awards a *capias* against a duke, earl, &c., which, by the law, doth not lie against them, and that

appears in the writ itself; and if the sheriff arrests them by force of the *capias*, although the writ be against law, notwithstanding, inasmuch as the court has jurisdiction of the cause, the sheriff is excused."

The same doctrines are held in the modern English cases. In *Carratt v. Morley*, 1 Q. B. 18, the warrant did not truly describe the court from which it issued, nor did it follow the form prescribed by the act of parliament; and the officer executing it was, therefore, held liable. "As the warrant here," said the court, "was such as no law authorized, it can be considered as no more than waste paper, and can afford no justification."

In such a case the clerk who executed the writ would also be liable. *Ib.*; *Andrews v. Marris*, 1 Q. B. 3. And the clerk is liable though the warrant be regular, so as to justify the officer, if he (the clerk) exceeded his power in executing it. *Andrews v. Marris, supra*. The distinction upon this point is, that the officer is bound only to show his writ, while all others concerned in its procurement are bound to show the judgment as well as the writ. *Ib.*

In *Andrews v. Marris*, 1 Q. B. 3, an action for false imprisonment was brought against the clerk of an inferior court and against a serjeant, whose duty it was to execute the precepts of the court. The clerk in executing the writ in question had exceeded his power; and it was contended that as in such case the writ was the clerk's only, and not that of the court, the rule excusing the officer did not apply. But it was held otherwise. *Morse v. James, Willes*, 122, was explained as being a case where the officer had joined in pleading with the party who obtained the writ, and had with him set out the whole proceedings;

so that he was bound by the defects apparent on the plea. The principle was, the court observed, that where an officer, for whom the writ or warrant alone would have been a justification, joins in pleading with the party for whom it would not, he foregoes the benefit of the warrant. *Philips v. Biron*, 1 Strange, 509; *Smith v. Bouchier*, 2 Strange, 993.

In *Tarlton v. Fisher*, 2 Doug. 671, the plaintiff was privileged from arrest; and yet the case being within the general jurisdiction of the court, the officer was held excused by his process. And this would probably be true though the officer knew that the plaintiff was privileged. *Chase v. Fish*, 16 Maine, 132. See *Stokes v. White*, 1 Crompton, M. & R. 223; *Cameron v. Lightfoot*, 2 W. Black. 1190; *Tarlton v. Fisher*, 2 Doug. 671; *Sewell v. Lane*, 1 Smith (Ind.), 167. See also *Deyo v. Van Valkenburgh*, 5 Hill, 242; *Farmers' Bank v. McKinney*, 7 Watts, 214.

Both the clerk and the officer will be protected where the writ, disclosing no fatal defect on its face, is made out and executed regularly; and if the magistrate has exceeded his jurisdiction, he alone will be liable. *Carratt v. Morley*, 1 Q. B. 18; *Lewis v. Palmer*, 6 Wend. 367. But the want of jurisdiction must appear upon the face of the record. *Crepps v. Durden*, 2 Cowp. 640; *Gray v. Cookson*, 16 East, 13; *Brittain v. Kinnaird*, 1 Brod. & B. 432. See also *Basten v. Carew*, 3 Barn. & C. 652; *Pike v. Carter*, 3 Bing. 78; *Wickes v. Clutterbuck*, 2 Bing. 483.

If the warrant be set aside, the attorney who procured it, and his client who authorized him to procure it, will be liable for false imprisonment, as was held in the principal case, *Barker v. Braham*. See also *Parsons v. Lloyd*, 2 W. Black. 844; *Chapman v. Dyett*, 11

Wend. 31; *Deyo v. Van Valkenburgh*, 5 Hill, 242; *Collett v. Foster*, 2 Hurl. & N. 356. But the sheriff is still protected if the writ was merely irregular. *Ib.*

In civil cases it would seem that this liability of the client could not arise before the writ was set aside, unless it was absolutely void, so that its existence as a writ would not be recognized; for while the writ is in force, to sue for false imprisonment, if judgment had been entered, would be to discredit a judicial proceeding in a collateral action; and if the case had not terminated, it could not be known that it would not terminate in favor of the plaintiff in that action. The writ must therefore be set aside before suit is brought for false imprisonment. But where the judgment has ceased to exist, as by payment or discharge, it is not necessary to have the writ set aside. *Deyo v. Van Valkenburgh*, 5 Hill, 242.

Quære as to the rule in the case of an arrest for crime? See *Crepps v. Durdan*, 2 Cowp. 640, where an action was sustained against a magistrate, after an illegal conviction, before the same was quashed. See also *Gray v. Cookson*, 16 East, 13.

Upon this point of the liability of the client it is difficult to understand the case of *Carratt v. Morley*, above cited, except upon the hypothesis that it was supposed to be a necessary preliminary step to this action that even a void warrant should be set aside; which is too improbable. A void *judgment* even may be collaterally impeached; *a fortiori*, a void warrant. In the case referred to, it was held that the party who instituted the suit in which the void warrant was issued was not liable to this action; and for this *Cohen v. Morgan*, 6 Dowl. & R. 8, was cited. But that case was

an action for an arrest in a criminal proceeding; while in *Carratt v. Morley* the arrest was made in a civil action. There is a wide difference, it is submitted, between such cases. In a criminal case the party who prefers the charge passes out of sight upon the issuance of the warrant. He relates the facts and circumstances upon which he bases his charge, and the magistrate then takes the matter out of his hands and gives it to the State as plaintiff. In a civil case the party instituting the suit manages it throughout, through his attorney, who is presumed to understand the law, and for whom the plaintiff therefore is responsible.

In criminal cases the party who prefers the charge is not liable unless it is made maliciously (though it is otherwise of the officer who makes the arrest); for the law encourages the exposure of crime. But if a person procure the arrest of another in a civil cause, a proceeding for his own benefit, and not for that of the public, and which he himself conducts, he acts at his peril if the process be irregular. *Carratt v. Morley*, *supra*, and *Johnson v. Maxon*, 23 Mich. 129, are in conflict with the principal case, *Barker v. Braham*, and with the more recent decision in *Collett v. Foster*, 2 Hurl. & N. 356, in which the principal case was followed. See also *Painter v. Liverpool Gaslight Co.*, 3 Ad. & E. 433, where in an action against the defendants for a false arrest in an action of trover the plaintiff had judgment. In answer to the protection of the warrant which the defendants claimed, *Littledale, J.*, said: "But this is an action against the company themselves; they are the persons who put *Parkinson*, the collector, in motion, and cause him to demand the rent and seize the goods. It is not he that justifies,

but they who allege that he acted under their authority; they adopt the warrant, and they identify themselves with him throughout the transaction. It was their duty, then, to see that the warrant was a proper one; and as it is not so, for want of a summons, the judgment must be against them."

As to the rule in criminal cases, see *Von Latham v. Libby*, 38 Barb. 339; *Brown v. Chadsey*, 39 Barb. 253; *Peckham v. Tomlinson*, 6 Barb. 253; *Coupal v. Ward*, 106 Mass. 289; *Joselynn v. McAllister*, 22 Mich. 300.

As to the rule in civil cases, see *Bonesteel v. Bonesteel*, 28 Wis. 245; s. c. 30 Wis. 511.

But these distinctions have sometimes been overlooked, as in *Bauer v. Clay*, 8 Kans. 580, and *Letzler v. Huntington*, 24 La. An. 330.

If, however, the process be set aside for error in granting it, it is otherwise; and the action for false imprisonment is not maintainable. The *Marshalsea*, 10 Coke, 68 b; *Williams v. Smith*, 14 Com. B. n. s. 596; *Cooper v. Harding*, 7 Q. B. 928; *Smith v. Sydney*, Law R. 5 Q. B. 203; *Simpson v. Hornbeck*, 3 Lans. 53. See *Gillett v. Thiebold*, 9 Kans. 427. "If the attachment [for contempt] in this case," said Williams, J., in *Williams v. Smith*, *supra*, "had been set aside on the ground of irregularity, or that it was issued in bad faith, or in any other way equivalent to irregularity, I should have thought that both the attorney and the client would be liable for any imprisonment which took place under it. But upon the facts which appeared at the trial, it is not true that the attachment was set aside for irregularity, or on the ground that it was issued in bad faith. The affidavit upon which it issued was sworn by Smith in the ordinary course of justice; and the Master of the Rolls

[before whom the proceedings for contempt had taken place] was satisfied that it was a proper one upon which to found an attachment. It was not suggested, when the application was made to that learned judge to set aside the attachment, that there was any fault in the affidavit; but merely that the issuing of the attachment was not warranted by the circumstances. The Master of the Rolls, however, came to the conclusion that the facts did warrant the attachment. That opinion of the Master of the Rolls was pronounced by the Lords Justices to be erroneous. That brings the case within that class of cases where it has been held that the party causing process to be issued is not responsible for any thing that is done under it, where the process is afterwards set aside, not for irregularity, but for error."

This judgment of Mr. Justice Williams was pronounced to be a correct exposition of the law in a very recent case before the Queen's Bench. *Smith v. Sydney*, Law R. 5 Q. B. 203, 206. The question in that case was whether the defendant had acted in bad faith, the plaintiff contending that the judgment upon which the arrest had been made had been set aside for irregularity. But this imputation was negatived, the court held, by the fact that the judge had set aside the judgment upon payment of costs by the present plaintiff; showing that it had been done as a favor. And the court took occasion again to enforce the distinction between the case of an arrest under a judgment set aside for error, and a judgment set aside for irregularity. The former was the act of the court, for which a party could not be liable; the latter was the act of the party himself.

Arrests without Warrant. — At common law no valid arrest can be made

for a misdemeanor, either by an officer or a private person, except on the spot. An arrest on suspicion renders the party liable for false imprisonment. *Bowditch v. Balchin*, 5 Ex. 378; *Griffin v. Coleman*, 4 Hurl. & N. 265, 270. See *Rohan v. Sawin*, 5 Cush. 281, where the court held that the act for which the arrest had been made was a felony, recognizing the rule that otherwise the officer's act could not be justified.

So, too, the arrest must be made before the affray has ended. In *Baynes v. Brewster*, 2 Q. B. 375, the defendant pleaded in justification to this action that the plaintiff had been disturbing his premises in the night-time, and that he had refused, on request, to desist; that the defendant then sent for a constable for the purpose of taking the plaintiff into custody, and thereby preventing him from making further disturbance; that the plaintiff thereupon ran away and was pursued by the defendant and overtaken near by; and that, for the purpose of preserving the peace and preventing further disturbance, he then gave him into the hands of the constable. It was held that the plea disclosed no defence; since it did not appear that the constable had a warrant, or that the breach of the peace had been seen by him, or was likely to be continued or repeated. "No averment," said Lord Denman, "is made as to the plaintiff's intention at the time when he was overtaken; but it is alleged that defendant, in order to preserve the peace and prevent the plaintiff from continuing to disturb the tranquillity of defendant's dwelling-house, and making the noise there during the whole night, gave charge of him to the constable. That is, after the plaintiff has gone from the

dwelling-house, the defendant tells the constable to prevent the plaintiff from doing what it was impossible he should do in the place where he then was." Williams, J.: "No principle is more generally assumed than that a warrant is necessary to entitle him [a constable] to interfere after the affray is over. It is otherwise where the facts show that the affray is practically going on. That is on account of the obvious distinction as to public danger between a riot still raging and one no longer existing. The language of the plea here falls infinitely short of showing those facts upon the supposition of which alone the argument for the defendant is sustainable. The disturbance appears to have been discontinued before any act was done of which the plaintiff complains. After that, according to the plea, with a view of preventing a renewal of the disturbance, the defendant followed the plaintiff and gave him into custody. This we cannot hold to be a good defence, unless we are prepared to maintain that, wherever a breach of the peace has taken place, the party who has committed it may, no matter at what distance of time and place, be apprehended without a warrant."

The rule in regard to felonies, as the principal case, *Hogg v. Ward*, decides, is different; and an officer is justified in taking into custody, without a warrant, one whom he has reasonable ground to suppose guilty of having committed a felony, though in fact none has been committed. *Rohan v. Sawin*, 5 Cush. 281; *Beckwith v. Philby*, 6 Barn. & C. 635; *Perryman v. Lister*, Law R. 3 Ex. 197.

In this particular, that reasonable and probable cause for the arrest is a good defence in felonies, the action

for false imprisonment bears some resemblance to that for malicious prosecution; but the resemblance is superficial. Prosecutions are presumed to have been properly instituted; and hence in an action for malicious prosecution the plaintiff, in order to overcome this presumption, must allege and prove the want of probable cause for the proceeding. In an action for false imprisonment, however, it is not necessary to allege or prove that the act was done without probable cause (unless, perhaps, the declaration allege the imprisonment to have been made in the course of some judicial proceeding); for the act of itself is wrongful, and may not have been committed under legal authority. The presumption, therefore, which arises in the case of an action for malicious prosecution cannot exist; and the defendant, to succeed, must show that he acted upon reasonable and probable cause, where that is a good defence.

In the action for false imprisonment there has been some doubt whether the question of probable cause be one of law or of fact. It has been tacitly assumed in some cases that the question is for the jury; in others, that it is for the court. *Rohan v. Sawin*, 5 Cush. 281, a leading American case, belongs to the first class; and so do *Beckwith v. Philby*, 6 Barn. & C. 635, and *Brockway v. Crawford*, 3 Jones, 433. To the other class belongs perhaps *Perryman v. Lister*, Law R. 3 Ex. 197. See also the principal case, *Hogg v. Ward*, where the point was referred to, but not considered.

The point has, however, been expressly decided in several English cases, in accordance with the rule in actions for malicious prosecution,—that the question, where the facts are found, is

one of law; and if the facts are not found, the jury are to be instructed that if they find such and such facts, probable cause is made out. See *Hill v. Yates*, 2 B. Moore, 80; s. c. 8 Taunt. 182; *Davis v. Russell*, 5 Bing. 354; s. c. 2 Moore & P. 590; *Perryman v. Lister*, Law R. 3 Ex. 197.

In *Swinton v. Molloy*, 1 T. R. 537, note, an action of false imprisonment was brought by the plaintiff as purser of a man-of-war against the defendant, who was his captain; and the latter pleaded a justification. But it appeared in evidence that the defendant had imprisoned the plaintiff for three days, without inquiring into the matter; and Lord Mansfield therefore ruled that such conduct on the part of the defendant did not appear to have been a proper discharge of his duty, and that the justification failed.

In *Hill v. Yates*, above cited, the court followed the law of malicious prosecution as it had been settled in *Sutton v. Johnstone*, 1 T. R. 493, 794; Mr. Justice Dallas, saying, "Since the case of *Sutton v. Johnstone*, the question of probable cause is a matter of law, and cannot be left to the jury." This was said upon an application for a new trial, made on the ground of misdirection on this point by the judge at *nisi prius*.

In *Davis v. Russell*, *supra*, the point was again raised, and was elaborately argued. The question of probable cause had been left to the jury; but in such a way, as the direction was construed on appeal, as to show that if the evidence were believed, the defendant had established probable cause for the arrest. Best, C. J., said: "The question of probable cause is, no doubt, a question for the judge; but the jury must find the facts which are supposed

to constitute the probable cause, and it is sometimes difficult to draw the line between the law and the fact. It has been argued in effect that if the jury had intimated their belief of the facts, the plaintiff ought to have been nonsuited. But on these facts the judge could not properly have directed a nonsuit. It was necessary to leave to the jury whether, admitting the facts, the defendant acted honestly; for if he did not, . . . the verdict ought to have been against him, and with heavy damages. But the learned judge tells them, 'If you believe the facts, and thence infer that the defendant was acting honestly, you must find for him.' This was saying in substance that, in his opinion, the facts, if believed, furnished a probable cause for the defendant's conduct. But if the direction to the jury were on the whole substantially right, a mere inaccuracy of expression will not render it necessary to have recourse to a new trial. This direction was substantially right. It was for the jury to say whether they believed the facts; and if they believed them, whether the defendant were acting honestly; in other words, whether the jury, under the same circumstances, would have done as he did." Mr. Justice Park said he had never had a doubt that it was the province of the court to decide the question of probable cause. "But," said he, "as that must be compounded of the facts, and as the jury must decide on *them*, my practice has been to say, You are to tell me whether you believe the facts stated on the part of the defendant, and if you do, I am of opinion that they amount to a reasonable and probable cause for the step he has taken." And Mr. Justice Gaselee, before whom the case had been tried at *nisi prius*,

said that he had never meant to leave to the jury the question of probable cause.

In *Perryman v. Lister*, Law R. 3 Ex. 197, the question was whether the fact that the defendant had neglected to make certain very natural inquiries (there being a ready and obvious mode of ascertaining the truth) before making the arrest was a proper element in determining the question of probable cause. The judge at the trial had considered the neglect as important, and had ruled upon it that there was no probable cause for the arrest; and his ruling was sustained in the Exchequer Chamber. Though there had been some difference of opinion in the Court of Exchequer upon the precise point in issue, it was conceded by all of the judges that the general question of probable cause was a question of law.

The weight of authority is clearly this way; and on principle there is no ground for diversity on this point between the two actions. (For a consideration of the subject of probable cause in other aspects, reference may be made to the note on Malicious Prosecution.)

But while an officer may arrest for felony, without warrant, where none has been committed, if he has reasonable ground for his action, a private citizen can only so arrest on suspicion when a felony has been committed. He may arrest without warrant on the spot, personally or by calling an officer; but he can only justify for an arrest on suspicion by showing that a felony had actually been committed, and that he had probable cause for arresting the plaintiff for the crime. See the principal cases, *Timothy v. Simpson* and *Allen v. Wright*; also *Beckwith v. Philby*, 6 Barn. & C. 635, Lord Tenterden.

The prisoner can only be detained for three days, in order that the party for the purpose of being taken before whose goods had been stolen might a magistrate for examination, and only have an opportunity for collecting his for a reasonable length of time. Wright witnesses and bringing them to prove *v. Court*, 4 Barn. & C. 596. In this the felony. See also *Burke v. Bell*, case it was held under this rule that a 36 Maine, 317; *Brock v. Stimson*, 108 plea was bad which justified a detention Mass. 520.

SEDUCTION AND ENTICING AWAY.

MARTIN v. PAYNE, leading case.

Note on Seduction of Child.

Historical aspects of the subject.

The fiction of service.

Rights of widow. Daughter in service of third person.

Return and support of child through confinement.

LUMLEY v. GYE, leading case.

Note on Doctrine of enticing to break Contracts.

WINSMORE v. GREENBANK, leading case.

Note on enticing away and on seducing Wife.

Enticing wife away from husband.

Seduction of wife.

Proof of marriage.

MARTIN v. PAYNE.

(9 Johns. 387. Supreme Court, New York, October, 1812.)

Daughter in Employ of Another. A daughter of the age of nineteen years, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement for her continuance in his house for any time. While at her uncle's, she was seduced and got with child, and immediately afterwards returned to her father's house, where she was maintained, and the expense of her lying-in paid by him; though, had not the misfortune happened to her, she had no intention of returning to her father. *Held*, that an action on the case for debauching and getting his daughter with child, *per quod servitium amisit*, was maintainable by the father against her seducer, the father not having divested himself of his power to reclaim the services of his daughter; and the supposed relation of master and servant was presumed from his right to her services, arising from his liability to maintain and provide for her while under age.

THIS was an action of trespass on the case for debauching and getting with child Lanah, the daughter and servant of the plaintiff, by which he lost her service, and was obliged to pay a large sum of money for the expenses of her lying-in, &c.

The cause was tried at the Washington Circuit, in June, 1811, before Mr. Justice Spencer. At the trial the daughter of the plaintiff was produced as a witness, and proved the seduction and pregnancy, &c.; that at the time of the seduction, which

was in the spring of the year 1810, she was nineteen years of age, and lived in the house of her uncle, with whom she had resided from the autumn of 1809. She worked for her uncle when she pleased, and was to receive from him, for her work, one shilling per day. She also worked for herself, and expended all her earnings in clothes and necessaries for herself, as she saw fit. There was no agreement for her continuance in her uncle's house for any particular time ; but she went to reside with him on the terms above mentioned, with the consent of her father. The defendant paid his addresses to her while she was at her uncle's, and she expected to have married him, and had at that time no expectation of returning to her father's house to reside. During the period of her residence with her uncle she occasionally visited her father's house, remaining there a week at a time. Immediately after she was debauched she returned to her father, who supported her, and was at the expense of her lying-in, &c. It did not appear that the father had done any act dispensing with his daughter's service, other than consenting to her remaining with her aunt.

The defendant's counsel objected that the plaintiff was not entitled to recover ; but the judge, without deciding the question, permitted the cause to go to the jury, who found a verdict for the plaintiff, subject to the opinion of the court, on the facts in the case, as above stated.

Skinner, for the plaintiff. If, at the time of her seduction, the daughter can be considered as in the service of her father, the action is maintainable. The only evidence to the contrary is the declaration of the daughter that she did not expect to return to her father's house to reside ; but this must be taken in connection with her previous language, that she was courted by the defendant, and expected to be married to him. The fair inference from the whole testimony is, that she grounded her expectation of not returning again to live with her father on the belief that she was soon to be married to the defendant. It cannot, therefore, be said that here was, in truth, no *animus revertendi*. This case is clearly distinguishable from that of *Dean v. Peel*, 5 East, 45, which will no doubt be relied upon by the defendant's counsel. Here the daughter went to live with her uncle by consent of her father, under a contract with the uncle to pay her for her services. The father was bound to maintain her, and

permitted her to go out to earn wages. In case her uncle had refused to pay her, the father only could have maintained an action against the uncle to recover the wages. She must, therefore, in presumption of law, be considered as in the service of her father. He is responsible for her maintenance while she is under age, and is, therefore, entitled to her services and earnings. 1 Bl. Com. 446.

The case of *Dean v. Peel* is a recent decision of the English Court of King's Bench, and is opposed to the principle of prior adjudications. It is not a binding authority on this court.

Henry, contra. This is an action for a loss of service. A father cannot maintain an action against another for debauching his daughter and getting her with child. 2 Ld. Raym. 1032; 6 Mod. 127, s. c. He can only maintain an action of trespass *quare clausum fregit* for entering his house, and assaulting and getting his daughter with child, *per quod servitium amisit*. The only ground on which the action is sustainable is a loss of service; the rest is matter of aggravation. 3 Burr. 1878, *Postlethwaite v. Parkes*.

The plaintiff must make out an actual and subsisting relationship of master and servant. There must be an actual service, and under the paternal roof. If at the time of the seduction the daughter is not in the actual service of her father, he cannot maintain this action. The case of *Dean v. Peel* is in point. This case is not new law: it only recognizes principles before settled. The facts of this case are stronger against maintaining the action.

The mere circumstance that the father is legally entitled to the wages earned by his child will not give him a right to this action. The right of the father to those services is founded on the fact of his protecting and maintaining his child. He is entitled to this action, because he is the protector and guardian of the morals and virtue of his child; but if he suffers her to depart from his house, or withdraws his protection, he has no right to an action. If the daughter remains under his roof and protection, he may maintain an action for entering his house, and debauching her, *per quod servitium amisit*, though the daughter is an adult; but some acts of service, however slight, must be proved, though there need not be a contract of service. 2 Term Rep. 166.

Russel, in reply, insisted, that if the relationship of master

and servant existed at the time of the seduction, or at the time of the alleged loss of service, the action was maintainable ; for the daughter being under age, and having returned to the house of her father, while pregnant, and there lain in, an actual loss of service had happened. A service *de facto* is not necessary to be shown. It is enough that the father is entitled to the services of his daughter, while under age, and has a right to control her conduct. Her secret determination to marry, and not return to her father's house, cannot change the relationship, nor affect his rights. The principle of the decision in *Dean v. Peel*, that the daughter had expressed an intention not to return to her father's house, is not founded in reason ; and the case of *Postlethwaite v. Parkes* merely decides that this action is not maintainable where the daughter is of full age, and resides abroad out of her father's house.

SPENCER, J., delivered the opinion of the court. The case of *Dean v. Peel*, 5 East, 49, is against the action. It was there held that the daughter being in the service of another, and having no *animus revertendi*, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services ; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age ; and I consider it as a departure from all former decisions on this subject. It has frequently been decided that where the daughter was more than twenty-one years of age there must exist some kind of service ; but the slightest acts have been held to constitute the relation of master and servant in such a case. In *Bennett v. Allcott*, 2 Term Rep. 166, the daughter was thirty years of age : and Buller, Justice, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in *Postlethwaite v. Parkes*, 3 Burr. 1878, the action is not maintainable. In *Johnson v. M'Adam*, cited by Topping in *Dean v. Peel*, Wilson, J., said that where the daughter was under age he believed the action was maintainable, though she was not part of the father's family when she was seduced ; but when she was of age, and no part of the father's family, he thought

the action not maintainable. In *Fores v. Wilson*, Peake N. P. Cas. 55, which was an action for assaulting the maid of the plaintiff, and debauching her, *per quod*, &c., Lord Kenyon held that there must subsist some relation of master and servant; yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant.

Put the case of a gentleman's daughter at a boarding-school debauched and gotten with child: on what principle can the father maintain the action, but on the supposed relation of master and servant arising from the power possessed by the father to require menial services? for in such a case there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law afforded no redress? The case is perfectly analogous to the one before us: here the father merely permitted his daughter to remain with her aunt; he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant *de jure*, though not *de facto*, at the time of the injury, and being his servant *de jure*, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and, therefore, deny the motion for a new trial.

Motion denied.

Historical. — There is little of historical interest concerning the right of action of a parent for the seduction of his daughter, except in the tendency of the modern cases to break away, to some extent, from the only ground upon which it was formerly supposed the action could be maintained, to wit, the loss of the child's service; and this point is considered *infra*. The action was fashioned after the claim of a master for injuries to his servant whereby a loss of service was sustained; in which case it mattered not *how* the defendant had caused the damage to the master (except that it was necessary to prove the *scienter* in respect of the service). It was all one whether the servant had been actually "beaten, wounded, and evil-entreated," or thus injured in a mere legal sense, as by seduction; the master recovered in either case for the loss of service sustained.

It may be worthy of mention, however, that in the time of Bracton it was said to be the law (following the doctrine of the Roman law) that a master had a right of action against a stranger

for the beating of his servant, done as an insult to the plaintiff. Bracton, p. 115 *b*; *ante*, p. 224. In such case, therefore, if there was also a loss of service, the master was entitled to recover for two distinct kinds of damage, the one for the pecuniary injury, the other for the injury to his pride. Not wholly unlike this is the modern rule in actions for seduction (presented *infra*), that juries are allowed to give damages not merely for the parent's pecuniary loss, but also for the mental suffering, mortification, and disgrace brought upon him and his family by the act of the defendant.

The Fiction of Service. — The doctrine of Dean *v. Peel*, 5 East, 45, which makes the criterion of recovery in an action for seduction to depend upon the *animus revertendi*, where the daughter was living out at service (though still subject to the parent's authority and control) when seduced, has been generally repudiated in this country, and the principal case, *Martin v. Payne*, followed. But the allegation of service, though generally but little more than a fiction, is still held indispensable; and it must appear that the parent, whatever or wherever the situation of the daughter, had at the time of the seduction the right to control the daughter's service. If his power over her is gone at that time, whether by his own consent in emancipating her or by the act of the law in taking her away from him, he cannot maintain the action; though there has been some conflict upon this point, in case of the return of the infant to the parent after seduction, as we shall hereafter see. *Sargent v. —*, 5 Cowen, 106. 116. But if he be not divested of his authority, the action will be maintainable though the daughter be away from home at the time, and have no intention of returning. So, if the

parent was divested of his daughter's service by the defendant's *fraud*, the action may be maintained. *Speight v. Oliviera*, 2 Stark. 493; *Dain v. Wycoff*, 7 N. Y. 191.

In *Hornketh v. Barr*, 8 Serg. & R. 36, the Supreme Court of Pennsylvania reached the same conclusion as did the court in *Martin v. Payne*, upon similar facts. And the Supreme Court of New York reaffirmed their position in *Clark v. Fitch*, 2 Wend. 459, in *Stiles v. Tilford*, 10 Wend. 338, *Hewitt v. Prime*, 21 Wend. 79, 82, and in *Ingersoll v. Jones*, 5 Barb. 661. And later still the Court of Appeals have sustained the same doctrine. *Mulvehall v. Millward*, 11 N. Y. 343. And the same doctrine prevails in Massachusetts. *Kennedy v. Shea*, 110 Mass. 147.

In these and in other cases the fiction is spoken of with disfavor; but it is nevertheless upheld, and proof of the right of the plaintiff to the child's services held necessary. Proof of *acts of service* is, indeed, unnecessary. The right to the service is enough. And this is true even in England, where the courts have always been more strict in requiring proof of service than in this country. See *Terry v. Hutchinson*, Law R. 3 Q. B. 599, 602, *Blackburn, J.* Though this was a case in which the daughter was in fact returning to her father when seduced, after having been dismissed from the service of another.

See also the language of *Bronson, C. J.*, in *Bartley v. Richtmyer*, 4 Comst. 39, 47. After stating that several unsuccessful attempts had been made in England to maintain this action upon other grounds than the right of service, he says: "Our cases stand upon the same foundation, with only this difference, that we go further than the English courts in making out the con-

structive relation of master and servant, and hold that it may exist for the purposes of this action, although the daughter was in the service of a third person at the time of the seduction, provided the case be such that the father then had a legal right to her services, and might have commanded them at pleasure." See *Roberts v. Connelly*, 14 Ala. 235, where the daughter had been sent away from her mother because the latter was a prostitute, and the right of action was denied; the mother being an improper person to act as guardian of her child.

It follows, *a fortiori*, that where the infant daughter, when seduced, is only absent from her father upon a visit, the action is maintainable. See *Griffiths v. Teetgen*, 15 Com. B. 344; *Bartley v. Richtmyer*, 4 Comst. 38, 44. So, where the daughter returns at night from her employment, and lodges at her father's house, assisting in the household duties. *Rist v. Faux*, 4 Best & S. 409; *Ogden v. Lancashire*, 15 Week. R. 158. (But as to the limits of the rule in England upon this latter point, see *Thompson v. Ross*, 5 Hurl. & N. 16; *Manly v. Field*, 7 Com. B. N. s. 96; *Hedges v. Tagg*, Law R. 7 Ex. 283.)

And this is true even of an adult daughter, if the relation of master and servant continue to exist. *Sutton v. Huffman*, 3 Vroom, 58. It was said in this case that the arrival at majority does not emancipate the child if the parent continue to exercise authority, and the child to submit to it; emancipation being a question of fact, to be determined by the circumstances of the case and the intention of the parties. And the same doctrine was held in *Lipe v. Eisenlerd*, 32 N. Y. 229. See also *Brown v. Ramsey*, 5 Dutch. 117.

Upon this point *Parker v. Meek*, 3

Sneed, 29, went too far, since in that case the (adult) daughter was seduced in the lifetime of her father, and the action was brought afterwards by her mother; upon which point see *infra*, p. 305.

Of course, where the daughter is of age when seduced, no action can be maintained if she no longer continues to submit to the authority of the parent; which shows again that the right of service is at the foundation of the action. See *Nickleson v. Stryker*, 10 Johns. 115; *Miller v. Thompson*, 1 Wend. 447; *Lee v. Hodges*, 13 Gratt. 726; *Manly v. Field*, 7 Com. B. N. s. 96; *Sutton v. Huffman*, 3 Vroom, 58.

How strictly the English courts adhere to the necessity of the existence of the relation of master and servant in these cases may be seen in *Thompson v. Ross*, 5 Hurl. & N. 16. In that case the daughter when seduced was living with a third person for wages, but occasionally, with the consent of her mistress, performed services for her parent, the plaintiff. There was nothing to show that the daughter had been bound out to service; and under the American rule the parent would have been entitled to an action for her seduction. But the English court, following the logic of *Dean v. Peel*, held the contrary. "We are all agreed," said Pollock, C. B., "that there was no service in this case. The service must be a real, genuine service, such as a parent, master, or mistress may command. Here the girl did work for her mother by consent of the lady who was her true mistress. It was argued that if a daughter making tea in the house of her parent is a sufficient service to entitle the parent to sue for the loss of such service, a parent might sue in the case of a domestic servant going home on Sunday evenings and making tea there. But here, as in that

case, there was merely a permission which at any moment might have been withdrawn."

The very recent case of *Hedges v. Tagg*, Law R. 7 Ex. 283, was similar, except that the daughter (who was under the employ of another as governess) had been seduced while on a three days' visit at her mother's; and the same decision was reached.

The court seem to have fallen into error in *Eager v. Grimwood*, 1 Ex. 61. It was there held that the seduction by the defendant must have resulted in pregnancy; and the jury having found that the child had not been begotten by the defendant, it was held that the action could not be maintained. And this, on the ground that there could be no loss of service in such case.

The contrary was held in *Abrahams v. Kidney*, 104 Mass. 222. In this case the court at *nisi prius* had ruled that the action could not be sustained unless the seduction was followed by pregnancy or sexual disease; and this was held to be error. Mr. Justice Morton, in delivering the opinion of the court, said: "The rule which governs the numerous cases upon this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives a master an action where the connection causes pregnancy or sexual disease applies to all cases where the proximate consequence of the criminal act is a loss of health resulting in a loss of service. There may be cases in which the seduction, without producing pregnancy or sexual disease, causes bodily injury,

impairing the health of the servant, and resulting in a loss of services to her master. So, the criminal connection may be accomplished under such circumstances, as, for instance, of violence or fraud, that its proximate effect is mental distress or disease, impairing her health and destroying her capacity to labor. In either of these cases the master may maintain an action, because the loss of service is immediately caused by the connection, as much as in cases of pregnancy or sexual disease. *Van Horn v. Freeman*, 1 Halst. 322."

Eager v. Grimwood is also doubted in 1 Smith's Lead. Cas. 260 (6th Eng. ed.), and again by Bovill, C. J., in *Evans v. Walton*, Law R. 2 C. P. 615, 617; though Mr. Justice Willes in this case thought the court bound by that decision. See also *White v. Nellis*, 81 N. Y. 405, where it was held that the action would lie without proving pregnancy. The intercourse in that case had resulted in disease.

It is not necessary, of course, that the party suing should be the parent of the child; wherever the relation of master and servant, actual or constructive, exists, the action will lie. *Fores v. Wilson*, Peake, 55. Thus, it is held that an uncle or aunt who has brought up a niece may sue for her seduction. *Manvell v. Thomson*, 2 Car. & P. 303. Though, it seems, the parent be living. *Edmonson v. Machell*, 2 T. R. 4. So, of one who has adopted and bred the daughter of another. *Irwin v. Dearman*, 11 East, 23; *Ingersoll v. Jones*, 5 Barb. 661. But a step-father cannot sue for the seduction of a child who has left him and entered the service of another, though she returns to his house and is there nursed through confinement. *Bartley v. Richtmyer*, 4 Comst. 38. It would, probably, be otherwise

where the step-father is bound by statute to support his step-children. But there should in all cases be an allegation of loss of service. *Grinnell v. Wells*, 7 Man. & G. 1033.

With respect to the damages to be allowed in this action, there has been, apparently, a departure from the principle upon which the action is based, this loss of service; for it was said, as long ago as in *Lord Ellenborough's* time, that the practice had become "inveterate" of giving damages far beyond the value of the daughter's services as a well person. *Irwin v. Dearman*, 11 East, 23. In this case the only actual damage proved by the plaintiff was the loss of the young woman's service for five weeks, during the time of her absence in the parish workhouse, where she was confined. But the jury gave £100 damages, and the verdict was upheld, though the young woman was only an adopted child.

Mr. Justice Blackburn, approving of the doctrine of this case, says: "In effect, the damages are given to the plaintiff as standing in the relation of *parent*; and the action has at present no reference to the relation of master and servant, beyond the mere technical point on which the action is founded." And further on, in the same opinion: "As to the amount of damages, I hold that now the jury are to consider the injury as done to the natural guardian, and all that can be referred to that relation. I do not say that they ought to calculate the actual cost of the maintenance of the grandchild, though they cannot well exclude that fact; but they may consider not only that the plaintiff has a daughter disgraced in the eyes of the neighbors, but that there is also a living memorial of the disgrace in a bastard

grandchild. Considering this, are £150 damages too much? I cannot say that they are." And the other judges were of a like opinion. *Terry v. Hutchinson*, Law R. 3 Q. B. 599, 602. But it was still considered necessary that the relation of master and servant should exist to give the right of action; that is, that the parent should, at the time of the seduction, have the right to the child's services.

The principle seems to be that the matter of service is essential to the action, but that, when this has been established by showing the parent's right of control, the court has jurisdiction to proceed beyond the mere loss of services, and award damages for the disgrace brought upon the family. See *Ingersoll v. Jones*, 5 Barb. 661; *Bartley v. Richtmyer*, 4 Comst. 38; *Damon v. Moore*, 5 Lans. 454; *Sargent v. —*, 5 Cowen, 106; *Badgley v. Decker*, 41 Barb. 577; *Moran v. Dawes*, 4 Cowen, 412; *Stiles v. Tifford*, 10 Wend. 338.

It has been held that if there be no seduction, and the intercourse be effected without objection or the use of insinuating arts, this will be admissible evidence in mitigation of damages. *Hogan v. Cregan*, 6 Rob. (N. Y.) 138. But *quære* if even then the plaintiff can never recover damages beyond the loss of service. The disgrace to the family would usually be greater in such a case than where an unwillingness of the daughter had to be overcome. If this disgrace can be taken into consideration at all, what difference can it make whether the daughter was quite willing or not, unless she was notoriously loose, and had already disgraced her family? The above case of *Hogan v. Cregan* was disapproved in *Damon v. Moore*, 5 Lans. 454, as to the ruling that actual

seduction was necessary to the giving of exemplary damages. In *Damon v. Moore* the alleged seduction was accompanied with force.

Evidence of a promise to marry, after the seduction, which the plaintiff refused, is inadmissible in mitigation, though the daughter would have consented. *Ingersoll v. Jones*, 5 Barb. 661.

The loss of service must, of course, be the proximate cause of the seduction. *Knight v. Wilcox*, 14 N. Y. 413. If no pregnancy follow, but only loss of health, caused by mental suffering which is not the consequence of the seduction, but is produced by subsequent intervening causes, such as abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of service is too remote a consequence of the act. *lb.*; *Abrahams v. Kidney*, 104 Mass. 222, *Morton, J.*; *Boyle v. Brandon*, 13 Mees. & W. 738.

So it is held that evidence is inadmissible in this action that the defendant procured an abortion upon the female, on the ground that the resulting damages were too remote. *Klopper v. Bromme*, 26 Wis. 372.

Rights of Widow. Daughter in Service of Third Person.—Some of the cases have swung far away from *Dean v. Peel*. In *Sargent v. —*, 5 Cowen, 106, the declaration stated that E. B., daughter of the plaintiff, had been bound by indenture as servant to P. F.; that she had been debauched by the defendant while at service with P. F.; that, pregnancy having followed, the indentures were cancelled by the parties, and the daughter then returned to the service of the plaintiff; and that afterwards, while yet an infant, and in the service of the plaintiff, she was de-

livered of a child, *per quod*, &c. It was not proved that there was, in fact, any seduction; the daughter, it appeared, had been extremely loose and indecorous in her habits; and yet the jury returned a verdict for the plaintiff with \$920 damages. On a motion for a new trial, on the ground that there had been no loss of service to the plaintiff, since she had signed the indentures, and because of excessive damage, the Supreme Court held these grounds insufficient to justify the motion. The case, however, went off upon other grounds, and a new trial was granted.

Mr. Justice Sutherland, who delivered the judgment, said: "It must be conceded that if the indentures of apprenticeship had not been cancelled or voluntarily rescinded by the parties, the mother could not have maintained this suit. It is not founded upon the relation of parent and child, but of master and servant; and where the latter relation does not exist, either in fact or in judgment of law, no loss of service can be alleged or proved, without which an action on the case for seduction cannot be sustained. . . . In an action of trespass on the case for an injury like this, the real cause of action is the expenditure of money, and the loss of service consequent upon the seduction. Hence, the action cannot be sustained for seduction unless it is followed by pregnancy, or the loss of health, and consequently of service. 3 Bl. Com. 142, note. The *per quod* is the gist of the action. But trespass may be maintained where the defendant illegally enters the father's house; and debauching his daughter may be stated and proved as an aggravation of the trespass, although it may not have been followed by the consequences of pregnancy. Where the action is trespass,

whether it be followed by pregnancy or not, the illegal entry is considered the gist of the action, and the loss of service, &c., merely as consequential. If the trespass, therefore, be not proved, the plaintiff cannot in such case recover. 2 Ld. Raym. 1032; *Bennett v. Allcott*, 2 T. R. 168, per Buller, J.; 3 Bl. Com. 143, note. It would seem, according to these principles, not to be material who was entitled to the services of the female at the time of the seduction, when the action is case. But the real inquiry is, upon whom has the consequential injury fallen, — the expense attending her confinement, and the loss of her services? Suppose a daughter hired out by her parent for a month, or six months, and debauched during her service, but the fact not known nor the consequences of it apparent until after the expiration of her term of service, and her return to her father's house; is there no remedy in such a case? If there is, it must belong to the parent; for, if the circumstances of the case would support *trespass* in the name of the master, the recovery would be nominal merely, as he could not aver or prove the consequential injury by way of aggravation. Or, suppose the case put by counsel upon the argument, that an indented or hired servant is debauched by her master; has the parent no redress? The supposition is not to be endured. It cannot, therefore, be necessary, according to the theory or just principles by which this action is regulated, that the parent, in order to sustain it, should be entitled to the services of the daughter at the very instant when the act is committed, which subsequently results in a loss of service or necessary pecuniary disbursements. The latter circumstances constitute the real grava-

men; and if that fall upon the parent, it entitles him to the legal redress."

This case, while accepted in the more general principles laid down by the court, has been denied to be law in deciding that a right of action in such cases belongs to the mother, especially under the circumstances of the case. *South v. Denniston*, 2 Watts, 474; *Roberts v. Connelly*, 14 Ala. 235.

In *South v. Denniston*, Gibson, C. J., said that, while the doctrine of *Dean v. Peel* had been justly repudiated, since, as to the father, his right to his daughter's service was independent of her will, the rule was otherwise as to the power of a widowed mother. "A mother," said he, "being at best in the category of a father who has parted with his right, can maintain an action but on proof of actual service at the time of the seduction. Not being bound to the duty of maintenance, she is not entitled to the correlative right of service; and standing as a stranger to her daughter in respect to these, the relation of mistress and servant can be constituted between them but as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it." Referring directly to *Sargent's Case*, the learned Chief Justice continued: "But nothing is more sure than that a mother is not entitled to the service of her child by the common law; and the decision, therefore, obviously rests on some statutory provision, devolving the parental rights of the father upon his widow, which is not in force here." And he then suggested a doubt whether, even under a statutory provision of that kind, a right of action existed for a seduction which had taken place after the widow had parted with her right, without reservation or recall; and even

taking it for granted that it reverted to her upon the cancellation of the indentures. He said that it required but little aid from authority to sustain the principle that a party could not entitle himself to an action for what was no wrong to him by employing a disabled servant. "An action for loss of service," he observed, "would certainly not lie for beating one who was not in the plaintiff's service at the time, because it would be esteemed an act of folly in him to employ an unfit person; and it must necessarily be indifferent, in point of principle, whether the unfitness were caused by beating or impregnation. It was so considered in *Logan v. Murray*, 6 Serg. & R. 175, where the daughter had come pregnant into the mother's service, after the death of her father, in whose service she had been debauched. As to the childbed expenses, assuming that the mother is liable to bear them (though we certainly have no law for it), these, though proper to swell the damages, are not a substantive ground of the action, as was held in *Logan v. Murray*; and as to the argument so earnestly pressed upon us, that she is entitled to compensation for the increased risk of becoming chargeable for the daughter's maintenance as a pauper, it is enough to say that it would make the mother's right depend on the contingent inability of the daughter to maintain herself, which is not the foundation of the action by a father, whose duty to maintain is an immediate one, and independent of all consideration of the child's own means."

The learned judge who delivered the opinion in *Sargent's Case* answered, by anticipation, the objection presented above, that a party could not claim damages when he had taken a disabled

servant into his service, by stating, at some length, that the seduction was good ground for the master to require the cancellation of the indentures; and, therefore, if the position tacitly assumed was correct, that the widow was bound to maintain the daughter, it followed that she must receive her upon the cancellation of the articles of indenture.

The confident assertion of Gibson, C. J., that the widow is not entitled to the services of her infant children, is repeated by the Court of Appeals of New York in *Bartley v. Richtmyer*, 4 Comst. 38, 46. See also 2 Kent, Com. 191. And in this case of *Bartley v. Richtmyer*, the further point in *Sargent's Case*, doubted by Chief Justice Gibson, that the defendant was liable to the plaintiff though the seduction had occurred while the infant was in the legal service of another, was also denied to be law. We propose to examine these questions at some length.

It is conceded that in the lifetime of both parents the father has full control over the services of his children, until he has been adjudged incompetent by process of law, and that his control is exclusive. *Chambers, Infancy*, 89. The father is entitled to the custody and care of the children, even infants at the breast, as against the mother. *Ib.* 86, 89; *De Manneville v. De Manneville*, 10 Ves. 62. The common law recognizes no division of rights between them. The question, then, is, whether upon the father's death this power and authority devolve upon the mother, either as succeeding to the rights of her husband *quasi* an heir, or by reason of their previous dormant existence in her, which only required the death of the husband to enable them to spring into full force.

It is pretty clear that the widowed

mother does not acquire the same extent of authority in all respects as the father possessed; she cannot, for instance, compel them to change the religion in which the father desired them to be educated. *Talbot v. Shrewsbury*, reported in *Chambers, Infancy*, 118; *Reynolds v. Teynham*, 9 *Mod.* 140. Nor does the mother become guardian necessarily, upon the death of her husband, even if, where she is appointed such, she succeeds entirely to the position of the deceased parent (upon which see *infra*). The infant, if fourteen years of age, may select his own guardian, regardless of the competency of the mother for such position. In *Heysham v. Heysham*, 1 *Cox*, 179, the mother was refused the guardianship because of her insolvency; and in *Roach v. Garvan*, 1 *Ves.* 157, the mother was removed on account of disputes between her and the infants, and accusations of endeavoring to marry one improperly, — facts which, it is believed, would not have sufficed to cause the father to be superseded in his natural guardianship. Besides, she is bound, when appointed guardian, to conform to the father's wishes about the education of the children.

The duty of maintenance is often spoken of as the ground of the liability of the father's right to the services of his children; and it is said to follow that if the mother is not bound to support them after his death, she cannot compel their services, and therefore cannot maintain this action.

It may be doubted if the (assumed) duty to support his minor children be the reason why the father is entitled to their services. He is certainly under no duty, moral or legal, to support grown-up children when he lacks the ability, pecuniary or physical, to do so,

especially if they possess the means or ability to support themselves. Indeed, the duty is by statute often the other way. The statute of 43 *Eliz. c. 2, § 7*, which is generally in force in this country, except as to grandparents (2 *Kent*, 190), enacts that the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person. Under this law the parent can require the aid of his children, though wholly unable to reciprocate the benefit in any pecuniary way. The statute looks towards some other obligation on the part of children than that arising from support. And it is to be observed that in cases under this wise provision of law a widowed mother must clearly be entitled to sue for the seduction of a daughter able to help her, possibly though the daughter be of age; for by that wrong she is deprived of support which she might otherwise have by law required.

This statute expresses only the natural sense of filial obligation; and it is absurd and untrue to rest the duty of children to their parents upon what often cannot be given. The child's service belongs to his father, because his father is the author of his being. The Roman law carried this idea to an extent which could not now be tolerated. It at one time gave the father the power of life and death over his children; they were his property, as much so as were his slaves, and continued such until his death, unless he had previously emancipated them. 2 *Kent, Com.* 203–205. And the Jewish law was similar. *Deut. xxi. 18*. Our law is pervaded by juster ideas; but

the ground of the child's duty is doubtless the same as it was considered to be in the Roman law, — the fact that the father has brought the child into the world. The child in a qualified sense *belongs* to his father during minority; and for this reason the father is entitled to his services. See upon this point a case cited by Coleridge, J., in *Lumley v. Gye*, 2 El. & B. 216, 250, 257, from the Year-Book of 11 H. 4, a, fol. 23 A, pl. 46, where it was said by Hankford, J., that the reason why one should have a writ of ravishment of ward where a man procured the ward to go away, was that the ward "is a *chattel*, and vests in him who has the right."

That the supposed duty of maintenance is not the ground of this action may also be inferred from *Grinnell v. Wells*, 7 Man. & G. 1033, 1042, where Tindal, C. J., speaking directly upon the point there in issue, says that where there is an absence of any allegation of loss of service to the parent, the action is not maintainable, though there might be, as there was in the case before him, an allegation that the parent was compelled to pay the expenses arising from the defendant's wrongful act.

Besides, it appears to be settled that there does not exist any legal duty on the part of even a father to support his children, in the absence of statute, except under the act of Eliz., above cited. There are, it is true, many cases in which a duty of maintenance is spoken of; but it will be found that a mere moral duty is generally meant. Thus, in *Smee v. Martin*, Bunb. 136, it is said that the parent ought, "by the law of nature," to support the child. In *Wallis v. Hodson*, 2 Atk. 115, Lord Hardwicke uses the same expression. In *Butler v. Duncomb*, 1 P. Wms. 454, Lord Maccles-

field indeed spoke of the duty of the mother, on the death of the father, as one existing "by the law of the land and of nature;" but he refers to no authority to show that the duty is a legal one.

It is not to be denied, however, that there are cases which have been decided upon the assumed position that the father is legally bound to support his minor children without reference to the poor laws. Such are cases deciding that the father is liable for necessities furnished his children without his authority; but this class of cases has recently been under serious and careful consideration; and the result has been that their soundness has been greatly shaken, if not entirely overturned. In *Urmston v. Newcomen*, 4 Ad. & E. 899, the point was left a query whether a father who had *deserted* his child was liable in *assumpsit* for necessities furnished him without authority. It was conceded that could be no liability had there been no desertion; and Coleridge, J., referred to *Blackburn v. Mackey*, 1 Car. & P. 1, as having so decided.

In *Mortimore v. Wright*, 6 Mees. & W. 482, also an action to recover for necessities supplied the defendant's minor child, the language of Lord Tenterden, in *Nichole v. Allen*, 3 Car. & P. 36, was referred to, who there said, "There is not only a moral but a legal obligation on the defendant to support his child." To this Lord Abinger, C.B., replied, "That is only a *nisi prius* decision; and I cannot assent to any such doctrine." A similar decision in *Law v. Wilkin*, 6 Ad. & E. 718, was also denied; and the plaintiff was nonsuited. *Mortimore v. Wright* was soon after confirmed by the judges of the Common Pleas in *Shelton v. Springett*, 11 C. B. 462.

In the late case of *Bageley v. Forder*, Law R. 3 Q. B. 559, the necessities were supplied to the defendant's wife (who was living apart from her husband) for the child. The case was argued on the ground of the *wife's* authority; and was decided upon that ground. There was no suggestion that the defendant was otherwise liable. The majority of the court thought the wife, under the circumstances, had authority to pledge her husband's credit for the necessities, on the ground that, as she was justified in living apart from her husband, and had been given the legal custody of the infant, they might be regarded as her own necessities. Upon this point Cockburn, C. J., dissented, but said it was admitted that there was no direct liability on the father in respect of articles supplied on credit as necessary to the child. "It is now well established," said he, "that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law;" referring doubtless to the duty of the parent to care for his infant children of tender years.

This doctrine has more recently still been declared in this country. *Kelley v. Davis*, 49 N. H. 187. "Our statute laws," said Mr. Justice Foster, in delivering judgment in the case cited, "like the English statutes of 43 Eliz. and 5 Geo. 1, from which they were borrowed, are intended only for the indemnity of the public against the maintenance of paupers, and not for the reimbursement of an individual who may have relieved the necessities of a poor person in suffering and distress; and under our statutes no action can be sustained against a parent to recover

for necessities furnished to his child, except by the town, and after notice to the person chargeable."

The same doctrine is held in Vermont. *Gordon v. Potter*, 17 Vt. 348.

However, if the child comes within the terms of the poor laws, and the mother has the ability to support her, she will be bound to do so; but we conceive that this is not the true ground of her right to sue for the child's seduction, even in this case, where she clearly has the right. It is only an *a fortiori* reason.

But it is said that upon the death of the father the mother becomes, or is entitled, if there is no objection, to be appointed guardian of the minor children. Reeve says she is guardian in such case. *Domestic Relations*, 220. Chambers and Forsyth say she is *entitled* to the position. *Chambers, Infancy*, 97; *Forsyth, Infants*, 10, 11. Macpherson says: "The guardianship of the mother, if not superseded either by election or by the appointment of a new guardian by the court, is the proper and legitimate custody till the infant attains twenty-one." *Infants*, 65. While Kent says: "In case of the death of the father during the minority of the child, his authority and duty, by the principles of *natural* law, would devolve upon the mother;" the meaning of which seems to be that she is entitled by nature to the appointment of guardian.

If, upon the death of the father the mother becomes *ipso facto* guardian of the minor children, which is doubtful, the Pennsylvania cases are not in accord with each other; for it has been held in that state that a guardian is entitled to the services of his wards, so as to be able to sue for the seduction of a female. *Fernsler v. Moyer*, 3 Watts &

S. 416. This case was decided upon the authority of *Denison v. Cornwell*, 17 Serg. & R. 374.

We must dissent from this doctrine. Though there are *dicta* in *Denison v. Cornwell* to the effect that a guardian, standing in *loco parentis*, is entitled to the services of his ward, the case only decided that *assumpsit* could not be maintained in the *Common Pleas* by the ward against his guardian for services rendered. "All we mean to say," said the court, "is, that the compensation cannot be ascertained in an action like the present in the Court of Common Pleas. In this case the guardian has not settled any account of the ward's estate in the Orphan's Court of the proper county. He can be cited to do so: it is not too late. That court is, in our opinion, the appropriate tribunal to settle the accounts of guardians and wards." And there is a strong dissenting opinion by Tod, J., both as to the *dicta* referred to and as to the actual decision, that the ward had gone to the wrong court. "In my opinion," said the learned justice, "the law gives to a guardian no right to any services whatever from his ward."

The guardian does indeed stand in *loco parentis* for some purposes; but if support of the infant be any test of the guardian's right to his services, as was supposed in *Fernsler v. Moyer*, the guardian's position is wholly different from that of the father. The father, whatever his legal duties may be, cannot, when himself of ability, draw upon

the child's property for his support. In all of the cases which speak of the father's duty to support his children, the statement is that he must do so out of his own property, when able, and cannot use the child's property for that purpose though the child have a fortune of his own. *Chambers*, Infancy, 112; *Butler v. Butler*, 3 Atk. 60. But the guardian always resorts to the infant's estate, whether property was left him by his father, or whether he had an independent estate. "It may be laid down," says *Chambers*, "that neither law nor equity imposes any obligation upon guardians to maintain their wards in that character, or out of their own property." And this was admitted in *Fernsler v. Moyer*. The court say that the guardian is subject to all the duties of the father "except that of maintaining the ward out of his own estate."

If we are correct in supposing that the guardian cannot claim the services of his ward, he must then claim them, if at all, in right of his ward; and any wrong to the ward, whereby the ward is disabled from prosecuting his labors, must be claimed in the same way. When, therefore, he sues for the ward's seduction, the action is properly for the ward's benefit, and is brought as by her next friend; that is, it is brought substantially by the infant herself. But she cannot maintain an action for her own seduction where there was no promise of marriage; for *volenti non fit injuria*.¹ *Hamilton v. Lomax*, 26 Barb. 615. It follows, if this reasoning be

¹ See a case in Pennsylvania, in which there was evidence that the seduction occurred while the parties were "bundling," to the knowledge of the plaintiff, the girl's father. The custom was said to be general where the parties resided. The court, however, doubted this, but thought, at any rate, that it should not be encouraged, and, for the plaintiff's knowledge of the "bundling," gave judgment for the defendant. *Hollis v. Wells*, 8 Penn. Law J. Rep. 162. See also *Reddie v. Scoolt*, Peake, 240, where it was held that if the plaintiff, by his misconduct, contribute to the seduction of his daughter, he cannot sue for her seduction. *Seager v. Sligerland*, 2 Caines, 219; *Travis v. Barger*, 24 Barb. 614; *Graham v. Smith*, 1 Edm. Sel. Cas. 267.

correct, that the guardian cannot sue. It is therefore immaterial whether the mother be actually guardian upon her husband's death, or only entitled to the appointment; provided her suit be brought as guardian. It seems, however, that under the old abolished writ of ravishment of ward the guardian could sue where the ward was *procured* to leave him. See the case cited from the Year-Books, *ante*, p. 299. But it is to be observed that the Statute of Merton as to ravishment of wards related to heirs under the age of fourteen, when the infant ceased to be in ward. Before that time the child could give no valid consent to marriage as against the guardian, and hence perhaps the ravishment of the infant could not be by consent, since such a marriage was a ravishment. See Coke Litt. 79 *b*; 2 Inst. 202, 203. Thus, the guardian could sue, because there could be no consent to the wrong. The question is now narrowed down to this: Can the widow sue in her own right, as having acquired to this extent the situation of the father?

It seems difficult to affirm that the widow *succeeds* legally to the position of the father; though Chancellor Kent, as above quoted, says that the father's rights would "by natural law," devolve upon the mother. So far as succession or descent is concerned, the rights of the father would fall upon the child, as his heir, giving him control over his own services, and working, *pro tanto*, his emancipation. See *George v. Van Horn*, 9 Barb. 523, where it was held that the personal representatives of the father could not sue for a seduction which had taken place in his lifetime.

If the widow possesses the power of controlling the services of her infant children, it would seem, from the above

consideration, that she must possess it as of her own inherent right, — a right which, dormant while the father lives, comes into force upon his death. We are inclined to think this the correct view. Every consideration which favors the natural or legal right of the father to the services of his minor children applies to the mother; and, while the law cannot tolerate coequal powers during the lifetime of both parents, there is strong reason why the power of the widow should be upheld, aside from the reasons (if there are more than one) in common with those applying to the father. The mother has not the physical strength of the father, and she is in greater need of the protection and support of her children. She has endured suffering in the birth and nursing of the children which the father has not felt, and perhaps, from absence, has scarcely known. Other things being equal, the tie between the mother and child is stronger than that between father and child, especially during minority. The mother's care and influence during this period are far more powerfully exerted than the father's; and it is safe to say that the child feels under stronger obligations to the former than to the latter, a greater solicitude as to her comfort and welfare, and a livelier willingness to provide for her wants.

These considerations lead us to the opinion that the widowed mother is entitled to sue for the seduction of her minor daughter while the daughter remains under her roof. And it was lately so held in *Gray v. Durland*, 50 Barb. 100, s. c. 51 N. Y. 424, upon a review of the cases, and in *Damon v. Moore*, 5 Lans. 454.

But if it be not true that the widow is legally entitled to her minor child's

services, we still think the action maintainable. Why should it be an excuse to the seducer that the child was not legally bound to serve her mother? If she was *willing* to serve her mother, and, following her natural obligation, preferred not to assert her independence, how shall the seducer be justified in preventing the mother from enjoying this benefit? If one will relinquish a doubtful right under a strong moral duty, shall a third person be permitted to wickedly defeat the accomplishment?

There are some strong analogies in the law in favor of the right of action of the widow under this view. The borrower of goods retained beyond the time allowed, or a tenant at will, or a bailee of goods found, has a right of action against any one interfering with his possession, so long as the rightful owner permits him to retain it; and yet the party so in possession has no legal right to it. The owner is willing that he should retain it; and that is enough. So of the infant female. Though (possibly) owner of her services, she is willing, or, rather, generally *desires* that her mother should have them; and that should be a sufficient reason why the man who has prevented her mother from enjoying them should pay her their value. And *Sutton v. Huffman*, 3 Vroom, 58, and *Lipe v. Eisenlerd*, 32 N. Y. 229, already referred to, are direct authorities for this position.

There is a case which was tried before Lord Holt which also sustains this view. *Barber v. Dennis*, 2 Mod. 69; s. c. 1 Salk. 68. In this case the widow of a waterman had her apprentice taken from her and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover. It was agreed that the action

would well lie if the apprentice were a legal apprentice, for his possession would be that of his mistress, and whatever he earned would belong to her. But it was objected that the company of watermen was a voluntary society, and that the custom of London for persons under age to bind themselves apprentices did not extend to watermen; which was agreed by all. Then it was said that the supposed apprentice was no legal apprentice if the indentures were not enrolled according to the act of Parliament; and if he were not a legal apprentice, the plaintiff had no title. But Holt, C. J., said he would understand him an apprentice or servant *de facto*, and that would suffice against them, being *wrong-doers*.

So, in *Fitzh. N. B. 91 G.*, it is stated that "if a man ought to have toll in a fair, &c., and his servants are disturbed in gathering the same, he shall have trespass for assault of his servants, and for the loss of their service;" to which there is a note by Lord Hale, as follows: "Trespass for beating his servants, *per quod servitium amisit*, lies, although he was not retained, but served only at will. 11 H. 4, fo. 2, per Hull, accordant. And so, if A. retains B. to be his servant, who departs into another county, and serves C., A., before any request or seizure, cannot beat B.; and if he does, C. shall have trespass against him (21 H. 6, fo. 9), and recover damages, having regard to the loss of service (22 Ass. 76); and the retainer is traversable. 11 H. 6, fo. 30."

In the very late case of *Furman v. Van Size*, 10 Albany L. J. 251, the question was set at rest in New York in favor of the widow's right of action. The daughter was there in the employ of another, under an agreement made

with the mother, and was herself receiving the wages earned and applying them to her own purposes, with the mother's assent. And the fact that the mother has remarried is not material. *Lampman v. Hammond*, 3 N. Y. Sup. Ct. Rep. 293. See 10 Albany L. J. 354, 400.

There is also direct authority to this effect in England. In *Harper v. Suffkin*, 7 Barn. & C. 387, a married woman, separated from her husband, returned to her father's house and lived with him, performing various acts of service; and it was held, in an action by the father, for her seduction, that, as against a wrong-doer, it was sufficient to prove that the relation of master and servant existed *de facto* at the time of the seduction, and that, in the absence of any interference on the part of the husband, it was not competent for the defendant to set up the husband's right to the services of the wife as an answer to the action. See also *Martinez v. Gerber*, 3 Man. & G. 88; *Gray v. Durland*, 51 N. Y. 424.

In the late case of *Evans v. Walton*, Law R. 2 C. P. 15, which was an action for enticing away the plaintiff's daughter, who was of age, and had been assisting the plaintiff in his business, the point was again raised by the defendant that as there was no allegation of a binding engagement to service between the daughter and plaintiff, or that the daughter had been debauched, the action was not maintainable; but the court held the contrary, principally upon the above authorities. "No authority is to be found," said Bovill, C. J., "where it has been held that in an action for enticing away the plaintiff's daughter a binding contract of service must be alleged and proved. But there are abundant authorities to

show the contrary." As to *Cox v. Muncey*, 6 Com. B. N. S. 375, and *Sykes v. Dixon*, 9 Ad. & E. 693, which had been referred to by counsel as deciding the contrary, the learned Chief Justice distinguished them on the ground that from the form of the declaration in those cases it became necessary to prove some contract of service beyond that which the law would imply from the relation of the parties. And the same might be said of *Lumley v. Gye*, 2 El. & B. 216, *post*, p. 306.

Several recent American authorities go still further, and hold that the widow is legally entitled to the services of her minor children, and may maintain *assumpsit* for work and labor done by them. *Hammond v. Corbett*, 50 N. H. 501; *Matthewson v. Perry*, 37 Conn. 435. And of this opinion is Mr. Schouler. Domestic Rel. 325, 326.

Return and Support of Child through Confinement. — As to the other question raised by the conflict between *Sargent's Case* and *South v. Denniston*, — whether an action for seduction is maintainable by the parent when the daughter was at the time of the alleged injury in the service of another, but had returned to the parent before confinement, and was supported until recovery, — we think the Pennsylvania court right in deciding it in the negative.

It will be observed that we have not confined the question to the right of the widow; for if it be true that the father is not bound to support his child (except under the poor laws), he stands in no different relation to this question from the widow. We submit, therefore, that an action under such circumstances cannot be maintained by either parent.

The contrary involves an argument such as this: True, the parent was

under no legal obligation to support the child, and was not therefore bound to receive her back to his house; but he elected to do so, and as the child in fact returned, and as he could have compelled her service had it not been for the wrongful act of the defendant, the latter is liable to him for the loss sustained.

This cannot be sound. It proceeds upon the notion either that the defendant has injured the plaintiff in respect of a legal right, or that he has prevented him from acquiring such a right. But the case supposes that the parent had divested himself of his right to his daughter's services. He had no such right when the act was committed; and the defendant has not interfered with the right which he acquired on receiving his daughter back to his house. The only right which the plaintiff has is to the service of a disabled servant, whom he has voluntarily received; and the defendant has done nothing to impair the value of this service, since that would require an injury to be done after the return of the daughter.

The other position, that the defendant has prevented the plaintiff from acquiring the full benefit of the daughter's services as a well person, is equally untenable. It perhaps might be true, if the plaintiff had previously engaged his daughter to return to him, and the defendant had seduced her with knowledge of the fact, and intending to prevent the plaintiff from enjoying the services expected; but where there is no such engagement or understanding, it cannot be that the defendant is liable. No one would suggest that one who knocks down and disables a person whom another would have employed, and intended to employ, in his service,

could be liable to the latter, even though the latter afterwards should take the person for what he can still do; at least, unless there was an engagement to service known to the assailant at the time.

This might all be different if the parent were bound to provide for the child, or if the case were within the act of Elizabeth; for the defendant would be liable for all the natural damages flowing from his act, of which the plaintiff's injury in such case would be one. In the case supposed it would not be an injury to the plaintiff.

These propositions would cover the case of an action by the widow for a seduction of her daughter in the lifetime, and in the service, of the husband. And so we find it held in *Logan v. Murray*, 6 Serg. & R. 175, referred to by Chief Justice Gibson, *supra*; also in *Vossell v. Cole*, 10 Mo. 634. A contrary doctrine, which had been held by a majority of the court in *Coon v. Moffitt*, 1 Pennington, 583, was in this case denied to be law. See also *Parker v. Meek*, 3 Sneed, 29, in which such an action was upheld, though the daughter was of age when seduced.

So in *Davies v. Williams*, 10 Q. B. 725, where the daughter was seduced by the defendant while in his service, and, in consequence of her pregnancy, returned to her mother, who maintained her until after her confinement, it was held by the whole court that the action could not be maintained. Coleridge, J., said: "Where such relation is contracted after the seduction, the state of the case is, that the master employs a servant who is less valuable by reason of an antecedent occurrence; there is no consequential injury of which he can complain."

LUMLEY v. GYE.

(2 El. & B. 216. Queen's Bench, Trinity Term, 1858.)

Enticing to break Contract. 1st and 2d counts of the declaration, by lessee of a theatre, for maliciously procuring W. (who had agreed with plaintiff to perform and sing at his theatre, and nowhere else, for a certain term) to break her contract, and not to perform or sing at plaintiff's theatre, and to continue away during the time for which W. was engaged. 8d count, averring that W. had engaged with plaintiff to be, and had become and was, plaintiff's dramatic artiste for a certain term, and complaining that defendant maliciously procured her to depart out of her said employment during the term. On demurrer, *held*, by Wightman, Erle, and Crompton, JJ., that the counts were all good, and that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only *in fieri*, provided the procurement be during the subsistence of the contract, and produce damage; and that, to sustain such an action, it is not necessary that the employer and employed should stand in the strict relation of master and servant. *Seemle*, by the same judges, that the action would lie for the malicious procurement of the breach of any contract, though not for personal services, if by the procurement damage was intended to result, and did result, to the plaintiff. Coleridge, J., *dissentiente*.

THE first count of the declaration stated that plaintiff was lessee and manager of the Queen's Theatre, for performing operas for gain to him; and that he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time, with a condition, amongst others, that she should not sing nor use her talents elsewhere during the term without plaintiff's consent in writing. Yet defendant, knowing the premises, and maliciously intending to injure plaintiff as lessee and manager of the theatre, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform; by means of which enticement and procurement of defendant, Wagner wrongfully refused to perform, and did not perform during the term.

Count 2, for enticing and procuring Johanna Wagner to continue to refuse to perform during the term after the order of Vice-Chancellor Parker, affirmed by Lord St. Leonards,¹ restraining her from performing at a theatre of defendant's.

Count 3. That Johanna Wagner had been and was hired by plaintiff to sing and perform at his theatre for a certain time, as the dramatic artiste of plaintiff, for reward to her, and had

¹ See *Lumley v. Wagner*, 1 De G., M. & G. 604.

become and was such dramatic artiste of plaintiff at his theatre. Yet defendant, well knowing, &c., maliciously enticed and procured her, then being such dramatic artiste, to depart from the said employment.

In each count special damage was alleged. Demurrer; joinder. The demurrer was argued in the sittings after Hilary Term last, before Coleridge, Wightman, Erle, and Crompton, JJ.

Willes, for the defendant. The counts disclose a breach of contract on the part of Wagner, for which the plaintiff's remedy is by an action on the contract against her. The relation of master and servant is peculiar; and, though it originates in a contract between the employer and the employed, it gives rise to rights and liabilities on the part of the master different from those which would result from any other contract. Thus, the master is liable for the negligence of his servant, whilst an ordinary contractor is not liable for that of the person with whom he contracts. And a master may lawfully defend his servant, when a contractor may not defend his contractee. And so a master may bring an action for enticing away his servant. But these are anomalies, having their origin in times when slavery existed; they are intelligible on the supposition that the servant is the property of his master; and, though they have been continued long after all but free service has ceased, they are still confined to cases where the relation of master and servant, in the strict sense, exists. In the present case Wagner is a dramatic artiste, not a servant in any sense. (It is unnecessary to report the argument for the defendant further in detail, as the points made in it, and the authorities relied upon, are fully stated in the judgments of Crompton and Wightman, JJ.)

Cowling, contra. The general principle is laid down in Comyns's Digest, Action upon the Case (A): "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." In Comyns's Digest, Action upon the Case for Misfeasance (A 6), an instance is given: "If he threaten the tenants of another, whereby they depart from their tenures," citing 1 Rol. Abr. 108, Action *sur* Case (N), pl. 21. An action lies for procuring plaintiff's wife to remain absent. *Winsmore v. Greenbank*, Willes, 577, *post*. An action lay for ravishment of ward; and, if "a man procureth a ward to go from his guardian, this is

a ravishment in law." 2 Inst. 440. Now, as neither the tenants, the wife, nor the ward are servants, it cannot be said that the action for procurement is an anomaly confined to the case of master and servant. "Every master has by his contract purchased for a valuable consideration the services of his domestics for a limited time; the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given a remedy by a special action on the case. And he may also have an action against the servant for the non-performance of his agreement." 3 Bl. Com. 142. Blackstone thus treats the action by a master as an example for a general rule, that "inducing a breach of contract" is an injury for which an action lies. And surely any one, not a lawyer, would agree that the malicious and intentional procurement of a breach of contract was a wrong, and that the breach of contract intended to be procured was the direct consequence of that wrongful procurement. *Green v. Button*, 2 C., M. & R. 707, is apparently an authority for that larger proposition; and so is *Sheperd v. Wakeman*, 1 Sid. 79. It is not accurate to say that the remedy for breach of contract is confined to those privy to the contract. *Levy v. Langridge*, 4 M. & W. 337; affirming the judgment of the Exchequer in *Langridge v. Levy*, 2 M. & W. 519. In that case the son recovered, though the warranty was to the father. It is true that the damage to the plaintiff must be the natural and immediate consequence of the wrong of the defendant, and that it is not often that the unjustifiable act of an independent party is the natural consequence of that wrong; but when, as on this demurrer must be taken to be the fact, the defendant uses the contracting party as his tool to break the contract to the damage of the plaintiff, why should he not be answerable for the damage he thus intentionally produces? The procurement may in some cases be privileged, just as a libel or slander may be; but here it is malicious. It is, however, unnecessary to go so far in this case, as the contract is for exclusive personal services, and the authorities are clear that in such cases the action lies. (The arguments for the plaintiff on this part of the case, and the authorities cited, are so fully stated in the judgment that it is unnecessary to repeat them here.)

Willes, in reply. The averment of malice can make no difference. If the action does not lie without malice, it does not lie

with it ; and malice is never averred in actions for seducing servants. The passage cited from Comyns's Digest, Action upon the Case (A), does not throw much light on the matter. It is not disputed that damage resulting from a wrong gives a cause of action ; but the defendant's point is, that the act complained of is not a wrong within the technical meaning of the word ; and this is an instance of the rule, *ex damno sine injuria non oritur actio*. The instances cited, as supporting the general proposition, all range themselves under some well-known class of wrongs. The reference in Comyns's Digest, Action upon the Case for Misfeasance (A 6), is to 1 Roll. Ab. 108, Action *sur* Case (N), pl. 21 ; where it appears that the menaces were to "tenants at will, of life and limb." The tenants, therefore, were not bound to remain ; and the threats of life and limb must have been an interference with the plaintiff's property. Ravishment of ward also proceeds on the ground that the guardian had a property in his ward. *Winsmore v. Greenbank*, Willes, 577, extends the law as to enticing servants to enticing a wife ; but the principle is the same. The common law considers the wife the property and servant of the husband. In *Sheperd v. Wakeman*, 1 Sid. 79, the action was for asserting that the plaintiff was already married *per quod* she lost her marriage ; but to assert that a woman is about to commit bigamy is actionable *per se*. *Levy v. Langridge*, 4 M. & W. 337, was decided on the ground that there was what was equivalent to a fraudulent representation to the plaintiff as an article which he was to use. The act complained of in *Green v. Button*, 2 C., M. & R. 707, was also a wrong in itself. The injury done was analogous to slander of title. (The argument in reply, as to the effect of the contract being for exclusive service, is sufficiently shown by the judgments.) *Cur. adv. vult.*

In this term (June 3) the learned judges, being divided in opinion, delivered their judgments *seriatim*.

CROMPTON, J. The declaration in this case consisted of three counts. The first two stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for the performance by her for a period of three months at the plaintiff's theatre ; and it then stated that the defendant, knowing the premises and with a malicious intention, whilst the agreement was in full force, and before the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously

enticed and procured Miss Wagner to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre ; and special damage arising from the breach of Miss Wagner's engagement was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of Her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf ; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff, whereby she wrongfully departed from and out of the said service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time ; and special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred ; and the question for our decision is, whether all or any of the counts are good in substance.

The effect of the first two counts is, that a person, under a binding contract to perform at a theatre, is induced, by the malicious act of the defendant, to refuse to perform and entirely to abandon her contract ; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and had become and was the dramatic artiste of the plaintiff, for reward to her, and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste, whereby she did depart out of the employment and service of the plaintiff, whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner ; that Miss Wagner was not averred, especially in the first two counts,

to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention, and causes great and immediate injury. And the law as to enticing servants was said to be contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Laborers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that in all other cases of contract the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, or by harboring and keeping him as servant after he has quitted it, and during the time stipulated for, as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue; and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that

the service not actually continuing, can make any difference. The wrong and injury are surely the same, whether the wrong-doer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service; and I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists. The proposition of the defendant, that there must be a service actually subsisting, seems to be inconsistent with the authorities that show these actions to be maintainable for receiving or harboring servants after they have left the actual service of the master. In *Blake v. Lanyon*, 6 T. R. 221, it was held by the Court of King's Bench, in accordance with the opinion of Gawdy, J., in *Adams v. Bafeald*, Leon. 240, and against the opinion of the two other judges who delivered their opinion in that case, that an action will lie for continuing to employ the servant of another after notice, without having enticed him away, and although the defendant had received the servant innocently. It is there said that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping him out of his former service." This appears to me to show that we are to look to the time during which the contract of service exists, and not to the question whether an actual service subsists at the time. In *Blake v. Lanyon*, 6 T. R. 221, the party, so far from being in the actual service of the plaintiff, had abandoned that service, and entered into the service of the defendant in which he actually was; but inasmuch as there was a binding contract of service with the plaintiff, and the defendant kept the party after notice, he was held liable to an action. Since this decision, actions for wrongfully hiring or harboring servants after the first actual service had been put an end to have been frequent. See *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 Com. B. 247. In *Sykes v. Dixon*, 9 A. & E. 693, where the distinction as to the actual service having been put an end to was relied upon for another purpose, it does not seem to have occurred to the bar or the court that the action would fail on account of there having been no actual service at the time of the second hir-

ing or the harboring ; but the question as to there being or not being a binding contract of service in existence at the time seems to have been regarded as the real question.

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become the artiste of the plaintiff, and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment, or service, in the present case, was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for service of any particular description ; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labor or service for a given time under the direction of a master or employer who is injured by the wrongful act, more especially when the party is bound to give such personal services exclusively to the master or employer ; though I by no means say that the service need be exclusive. Two *nisi prius* decisions were cited by the counsel of the defendant in support of this part of the argument. One of these cases, *Ashley v. Harrison*, 1 Peake's N. P. C. 194, s. c. 1 Esp. N. P. C. 48, was an action against the defendant for having published a libel against a performer, whereby she was deterred from appearing on the stage ; and Lord Kenyon held the action not maintainable. This decision appears, especially from the report of the case in *Espinasse*, to have proceeded on the ground that the damage was too remote to be connected with the defendant's act. This was pointed out as the real reason of the decision by Mr. Erskine in the case of *Tarleton v. M'Gawley*, 1 Peake's N. P. C. 207, tried at the same sittings as *Ashley v. Harrison*, 1 Peake's N. P. C. 194, s. c. 1 Esp. N. P. C. 48. The other case, *Taylor v. Neri*, 1 Esp. N. P. C. 386, was an action for an assault on a performer, whereby the plaintiff lost the benefit of his services ; and the Lord Chief

Justice Eyre said that he did not think that the court had ever gone further than the case of a menial servant; for that, if a daughter had left the service of her father, no action *per quod servitium amisit* would lie. He afterwards observed that, if such action would lie, every man whose servant, whether domestic or not, was kept away a day from his business could maintain an action; and he said that the record stated that Breda was a servant hired to sing, and in his judgment he was not a servant at all; and he nonsuited the plaintiff. Whatever may be the law as to the class of actions referred to, for assaulting or debauching daughters or servants *per quod servitium amisit*, and which differ from actions of the present nature for the wrongful enticing or harboring with notice, as pointed out by Lord Kenyon in *Fores v. Wilson*, 1 Peake's N. P. C. 55, it is clear from *Blake v. Lanyon*, 6 T. R. 221, and other subsequent cases, *Sykes v. Dixon*, 9 A. & E. 693, *Pilkington v. Scott*, 15 M. & W. 697, and *Hartley v. Cummings*, 5 Com. B. 247, that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in *Taylor v. Neri*. In *Blake v. Lanyon* a journeyman who was to work by the piece, and who had left his work unfinished, was held to be a servant for the purposes of such an action; and I think that it was most properly laid down by the court in that case that a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work be finished. It appears to me that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule; and I think that, where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule. And I see no reason for narrowing such a rule; but I should rather, if necessary, apply such a remedy to a case "new in its instance, but" "not new in the reason and principle of it" (per Holt, C. J., in *Keeble v. Hickeringall*, 11 East, 573, 575, note (a) to *Carrington v. Taylor*, 11 East, 571); that is, to a case where the wrong and damage are strictly analogous to the wrong and damage in a well-recognized class of cases. In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. Cowling is not tenable, or as

saying that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrong-doer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt, which might be the only sum recoverable on the contract. Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party. I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt, if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment or a writ of conspiracy at common law might perhaps have been maintainable; and, where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action. See note (4) to *Skinner v. Gunton*, 1 Wms. 230. In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay any thing like the amount of the damage sustained entirely from the wrongful act of the defendant; and it would seem unjust and contrary to the general principles of law, if such wrong-doer were not responsible for the damage caused by his wrongful and malicious act.

Several of the cases cited by Mr. Cowling on this part of the case seem well worthy of attention.

Without, however, deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

ERLE, J. The question raised upon this demurrer is, whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time, whereby damage was sustained. And it seems to me that it will. The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance, — the answer appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of a violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrong-doer, and may be sued, either alone or

jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and if he is made to indemnify for such breach, no farther recourse is allowed; and, as in case of the procurement of a breach of contract, the action is for a wrong, and cannot be joined with the action on the contract; and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the actions for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to me sufficient to show that the principle has been recognized. In *Winsmore v. Greenbank*, Willes, 577 [*post*], it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is that the wife is not liable to be sued. But the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green v. Button*, 2 C., M. & R. 707, it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Sheperd v. Wakeman*, 1 Sid. 79, is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In *Ashley v. Harrison*, 1 Peake's N. P. C. 194, s. c. 1 Esp. N. P. C. 48, and in *Taylor v. Neri*, 1 Esp. N. P. C. 386, it was properly decided that the action did not lie, because the battery in the first case, and the libel in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants, by their wrongful acts, did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least, Lord Mansfield's judgment in *Bird v. Randall*, 3 Burr. 1345, is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract

may inflict an injury, the same as he who procures the abstraction of goods after delivery ; and both ought, on the same ground, to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted ; or, in the case of non-payment of a debt, where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damage against the debtor is interest only ; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases he who procures the damages maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and, in my judgment, ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

WIGHTMAN, J.¹ This was a demurrer to a declaration in an action against the defendant for maliciously, and with intent to injure the plaintiff, causing, procuring, and enticing Miss Wagner, who had contracted with the plaintiff to sing at his theatre, to break her contract and refuse to sing, by which he sustained damage.

The declaration contained three counts. The first two are for wrongfully and maliciously enticing and procuring Miss Wagner to refuse and make default in the performance of an executory contract, entered into by her with the plaintiff, to sing and otherwise perform at his theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, without alleging that Miss Wagner was in the service and employ of the plaintiff, and that she left such service and employ by the procurement and enticement of the defendant. The third count

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states that Miss Wagner, before the committing the grievances complained of by the plaintiff, had been and was hired and engaged by the plaintiff to sing and perform at his theatre from the 15th April, 1852, to 15th July following, as the dramatic artiste of the plaintiff, and that she had become and was such dramatic artiste of the plaintiff, and that the defendant, well knowing the premises, wrongfully and maliciously enticed and procured the said Miss Wagner to depart from and out of the said employment of the plaintiff, and to continue absent from it until the end of the period for which she was engaged. The first two counts are for maliciously procuring Miss Wagner to break a contract for services, and to refuse to perform it ; and the third is for maliciously procuring her to depart from the employment of the plaintiff.

It was contended, for the defendant, that an action is not maintainable for inducing another to break a contract, though the inducement is malicious and with intent to injure ; and that the breach of contract complained of is, in contemplation of law, the wrongful act of the contracting party, and not the consequence of the malicious persuasion of the party charged which ought not to have had any effect or influence ; and that the damage is not the legal consequence of the acts of the defendant. It was further urged that the cases in which actions have been held maintainable for seducing servants and apprentices from the employ of their masters are exceptions to the general rule, and are not to be extended ; and that the present case, as it appears upon the declaration, is not within any of the excepted cases.

With respect to the first and second counts of the declaration, it was contended for the plaintiff, that an action on the case is maintainable for maliciously procuring a person to refuse to perform a contract into which he has entered, and by which refusal the plaintiff has sustained an injury ; and, though no case was cited upon the argument in which such an action had been brought or directly held to be maintainable, it was said that on principle such action was maintainable ; and the authority of Lord Chief Baron Comyns was cited that in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case. In the present case there is the malicious procurement of Miss Wagner to break her contract, and the consequent loss to the plaintiff. Why, then, may not the plaintiff maintain an action on the case ? Because, as it is said, the loss

Several of the cases cited by Mr. Cowling on this part of the case seem well worthy of attention.

Without, however, deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

ERLE, J. The question raised upon this demurrer is, whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time, whereby damage was sustained. And it seems to me that it will. The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance, — the answer appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of a violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrong-doer, and may be sued, either alone or

jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and if he is made to indemnify for such breach, no farther recourse is allowed; and, as in case of the procurement of a breach of contract, the action is for a wrong, and cannot be joined with the action on the contract; and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the actions for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to me sufficient to show that the principle has been recognized. In *Winsmore v. Greenbank*, Willes, 577 [*post*], it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is that the wife is not liable to be sued. But the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green v. Button*, 2 C., M. & R. 707, it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Sheperd v. Wakeman*, 1 Sid. 79, is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In *Ashley v. Harrison*, 1 Peake's N. P. C. 194, s. c. 1 Esp. N. P. C. 48, and in *Taylor v. Neri*, 1 Esp. N. P. C. 386, it was properly decided that the action did not lie, because the battery in the first case, and the libel in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants, by their wrongful acts, did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least, Lord Mansfield's judgment in *Bird v. Randall*, 3 Burr. 1345, is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract

may inflict an injury, the same as he who procures the abstraction of goods after delivery ; and both ought, on the same ground, to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted ; or, in the case of non-payment of a debt, where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damage against the debtor is interest only ; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases he who procures the damages maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and, in my judgment, ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

WIGHTMAN, J.¹ This was a demurrer to a declaration in an action against the defendant for maliciously, and with intent to injure the plaintiff, causing, procuring, and enticing Miss Wagner, who had contracted with the plaintiff to sing at his theatre, to break her contract and refuse to sing, by which he sustained damage.

The declaration contained three counts. The first two are for wrongfully and maliciously enticing and procuring Miss Wagner to refuse and make default in the performance of an executory contract, entered into by her with the plaintiff, to sing and otherwise perform at his theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, without alleging that Miss Wagner was in the service and employ of the plaintiff, and that she left such service and employ by the procurement and enticement of the defendant. The third count

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states that Miss Wagner, before the committing the grievances complained of by the plaintiff, had been and was hired and engaged by the plaintiff to sing and perform at his theatre from the 15th April, 1852, to 15th July following, as the dramatic artiste of the plaintiff, and that she had become and was such dramatic artiste of the plaintiff, and that the defendant, well knowing the premises, wrongfully and maliciously enticed and procured the said Miss Wagner to depart from and out of the said employment of the plaintiff, and to continue absent from it until the end of the period for which she was engaged. The first two counts are for maliciously procuring Miss Wagner to break a contract for services, and to refuse to perform it ; and the third is for maliciously procuring her to depart from the employment of the plaintiff.

It was contended, for the defendant, that an action is not maintainable for inducing another to break a contract, though the inducement is malicious and with intent to injure ; and that the breach of contract complained of is, in contemplation of law, the wrongful act of the contracting party, and not the consequence of the malicious persuasion of the party charged which ought not to have had any effect or influence ; and that the damage is not the legal consequence of the acts of the defendant. It was further urged that the cases in which actions have been held maintainable for seducing servants and apprentices from the employ of their masters are exceptions to the general rule, and are not to be extended ; and that the present case, as it appears upon the declaration, is not within any of the excepted cases.

With respect to the first and second counts of the declaration, it was contended for the plaintiff, that an action on the case is maintainable for maliciously procuring a person to refuse to perform a contract into which he has entered, and by which refusal the plaintiff has sustained an injury ; and, though no case was cited upon the argument in which such an action had been brought or directly held to be maintainable, it was said that on principle such action was maintainable ; and the authority of Lord Chief Baron Comyns was cited that in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case. In the present case there is the malicious procurement of Miss Wagner to break her contract, and the consequent loss to the plaintiff. Why, then, may not the plaintiff maintain an action on the case ? Because, as it is said, the loss

enticed and procured Miss Wagner to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre; and special damage arising from the breach of Miss Wagner's engagement was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of Her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff, whereby she wrongfully departed from and out of the said service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time; and special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred; and the question for our decision is, whether all or any of the counts are good in substance.

The effect of the first two counts is, that a person, under a binding contract to perform at a theatre, is induced, by the malicious act of the defendant, to refuse to perform and entirely to abandon her contract; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and had become and was the dramatic artiste of the plaintiff, for reward to her, and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste, whereby she did depart out of the employment and service of the plaintiff, whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the first two counts,

to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention, and causes great and immediate injury. And the law as to enticing servants was said to be contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Laborers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that in all other cases of contract the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, or by harboring and keeping him as servant after he has quitted it, and during the time stipulated for, as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue; and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that

at common law in this instance; thus leaving the matter where it was. Again, it may be asked, if this form of action is founded entirely upon the Statute of Laborers, why did it not cease when that statute was repealed, 5 Eliz., 26 & 27 Vict. c. 125? Moreover, if the judgment of Coleridge, J., is right, what becomes of the common action for seduction of a daughter and servant? Is that to be only brought in cases within the Statute of Laborers? It is notoriously otherwise." Master and Servant, 126, 127 (3d ed.).

To this it may be added that the position taken by Coleridge, J., that the right of a master to sue another for causing a breach of the servant's contract of service dates from the Statute of Laborers, is incorrect. The law permitted masters, from the earliest times, to recover for batteries of their servants, in respect of the loss of service (see note on Assault and Battery, *ante*, p. 224); and there is no suggestion that the case was otherwise where the beating was so severe as to result in a breach of the servant's engagement.

So, too, Pulton states the law to be that if a servant depart from the service of his master by reason of menaces of life or limb, the master has a right of action against the menacer (*De Pace Regis*, 8); for which, among other authorities, he cites a case that may be found in 22 Lib. Ass. (Edw. 3) pl. 76, decided three years prior to the above-named statute.

Under the term "servant," in this connection, Pulton includes a bailiff; and the statute clearly did not extend to officers. But what is quite conclusive that Mr. Justice Coleridge was mistaken is stated immediately afterwards by the writer referred to. "And

the same law is," says Pulton, "if one man do so menace of life and member the *tenants* of another, which do hold of him certain lands and tenements at will, paying to him therefor certain yearly rent and services; in respect of which menace the same tenants do depart from their said tenements, and leave the said rents unpaid, and the same services undone; in this case, the lord or owner of the same tenements may have an action of trespass against such menacers in the King's Bench or Common Pleas, and declare of the said menacing of his tenants at will, of their departure from his tenancies thereby, and the loss and prejudice that he hath sustained by his rents unpaid and services undone, and he shall recover damages accordingly." And for this is cited *Liber Intrationum*, 592; 20 Hen. 7, p. 5; 9 Hen. 7, p. 7. It was otherwise, however, if the tenants were freeholders, or held for term of years. *Ib.*; 21 Hen. 6, p. 31.

The doctrine of the dissenting opinion in the principal case, so far as it rests upon the ground that none but the parties to a contract have a right of action for its breach, requires that there should be an enforceable contract, the breach of which is complained of; and whether the learned judge would have held the same view where the services were to be performed gratuitously does not appear. Now, it has been held from very early times that it is not necessary for a master, in suing a stranger for injuring his servant and thereby causing a loss of service to the plaintiff, to allege or prove a binding engagement to service. "If the servant did but serve his master at his pleasure, yet the master shall have an action of trespass for the loss of his service." Pulton *De Pace Regis*; 22 Hen.

6, 43, pl. 25. And the law is so still. *Martinez v. Gerber*, 3 Man. & G. 88. See *ante*, pp. 228, 229.

It must be so in the case of one who cannot properly be called a servant, and renders services gratuitously. Suppose, in the principal case, it had appeared that Miss Wagner had agreed to sing gratuitously, for the benefit of some charity, the managers of which had incurred the expense of securing a hall for the occasion, could it be supposed for a moment that they could not have maintained an action against the defendant for enticing her to break her engagement? And what is the ground upon which the defendant would be liable? Simply that he has knowingly and intentionally caused the plaintiffs a loss, and prevented them from making a positive gain. But he has done the same thing in the case under consideration; and what right has he to set up the fact that the plaintiff has a cause of action against some one else, or to demur to the declaration if such fact there appears? A railroad company, whose cars have run over and killed a man, cannot, in an action by his widow, allege that she has a right of action upon an accident insurance policy which she holds upon the life of the deceased (*Bradburn v. Great Western Ry. Co.*, Law R. 10 Ex. 1); and yet it is the act of the defendant which gave her the right to recover of the insurers. Nor can a defendant whose negligence has caused the burning of the plaintiff's house set up in defence that the plaintiff has a right of action for the loss upon a fire insurance policy; nor, *à converso*, can the insurance company in either case set up the plaintiff's recovery, or right of recovery, against the wrong-doer. The wrong-doer has nothing to do with the plaintiff's rights

against others; it is nothing to him that the plaintiff may have a right of action against a dozen other persons by reason of his act or theirs.

It is, however, said that the defendant's act is too remote, and is not the legal cause of the injury. The breach of the contract, says Mr. Justice Coleridge, is the cause of damage in both cases. (2 El. & B. 249.) But the act of Miss Wagner was not the cause of the breach; it was the breach itself. The act of the defendant was the cause of the breach. It is not, therefore, a case of near and remote causes. The plaintiff's position is that of one who is suing in respect of the proximate (since there is no other) cause of the breach. It is true that the breach of the contract is the cause of the damage, as the learned judge says; but that is not material; for the plaintiff would have had an action against Miss Wagner, though he could have proved no damage whatever. The damage may therefore be left out of the case, so far as the matter of proximate cause is concerned; and the true question is, was the act of the defendant the legal cause (not of the damage, but) of the breach?

If this, however, is too great a refinement, we apprehend that the defendant's act is as much the legal cause for the action as is the act of a man who has beaten a servant or tenant, and thereby caused him to leave the plaintiff.

The doctrine of *Lumley v. Gye*, that an action is maintainable against one who has knowingly caused the breach of a contract between the plaintiff and a third person, is not, perhaps, consistent with the converse position taken in certain English cases, that the breach of a contract gives no right of action to

a third person injured thereby. Win- sion to consider the soundness of these
 terbottom v. Wright, 10 Mees. & W. cases in a subsequent note. (Consult
 109; Collis v. Selden, Law R. 3 C. P. the Table of Cases for the page.)
 495. We shall, however, have occa-

WINSMORE v. GREENBANK.

(Willes, 577. Common Pleas, England, Trinity Term, 1745.)

Enticing Wife away. Verdict not set aside for excessive damages, in an action for enticing away the plaintiff's wife.

In an action on the case for inducing the plaintiff's wife to continue absent, it is sufficient to state that "the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c., by means of which persuasion, &c., she did continue absent, &c.; whereby the plaintiff lost the comfort and society of his wife;" without setting forth the means, &c., used by the defendant.

CASE. *Skinner, Willes, and Hayward*, Serjts., moved for a new trial upon several affidavits, setting forth (as they opened) that the verdict was against evidence, and the damages excessive, being 3,000*l*.

The action was an action on the case for enticing away and detaining the plaintiff's wife, which were laid in the declaration, with several other particular circumstances; but my brother Abney, who tried the cause, being in court, and certifying that the verdict was not against evidence, nor the damages excessive, and that he was not dissatisfied with it, we would not make any rule, nor did we suffer the affidavits to be read.

Counsel, after objecting to the wife's declarations, then moved in arrest of judgment.

In order to understand the grounds of the motion in arrest of judgment, it is necessary to state some parts of the record.

The declaration contained four counts. The first stated that on the 1st of January, 1741, Mary, then and until the 24th of December, 1742, being the wife of the plaintiff (but since deceased), unlawfully and without leave and against his consent departed and went away from him, &c., and lived and continued absent and apart from him from thence until and upon the 8th of August, 1742, and during the said time that the said Mary so lived and continued absent, a large estate, both real and

personal, to the value of 30,000*l.* was devised to her by W. Worth, D.D., her late father, for her sole and separate use, and at her sole and separate disposal; that thereupon she was desirous of being and intended to be again reconciled to the plaintiff, and to live and cohabit with him, whereby he would have had and received the benefit and advantage of the said real and personal estate (the plaintiff being willing and desirous to be reconciled, &c.), yet the defendant knowing the said premises and having notice of the said Mary's intention, but contriving to injure the plaintiff, and to prevent Mary the wife from being reconciled to him, &c., and to prevent the plaintiff receiving any advantage from the said real and personal estate, &c., on the 8th of August, 1742, *unlawfully and unjustly persuaded, procured, and enticed* the said Mary to continue absent and apart from the plaintiff, and to secrete, hide, and conceal herself from the plaintiff, *by means of which persuasion*, procuration, and enticement the said Mary, from the said 8th of August, 1742, until the time of her death on the 24th of December, 1742, *continued absent* and apart and secreted herself, &c.; *whereby the plaintiff during all that time totally lost the comfort and society of his said wife, and her aid and assistance in his domestic affairs, and the profit and advantage* that he would and ought to have had of and from the said real and personal estates, &c., and was put to great charges and expenses in endeavoring to find out and gain access to his said wife, in order to persuade and procure her to be reconciled to him.

The second count stated that on the 7th of August, 1742, Dr. Worth died, on whose death the plaintiff's wife became seised and possessed of real and personal estates to the value of 30,000*l.* to her sole and separate use, and at her sole and separate disposal, yet the defendant maliciously and wickedly intending to injure the plaintiff, and to deprive him of the aid, assistance, and comfort of his wife, and to raise, foment, and continue discords and quarrels between the plaintiff and his wife, and to alienate the affections of the wife from the plaintiff, and to deprive the plaintiff from having or receiving any advantage or benefit from the said estates, &c., on the 8th of August, 1742, *unlawfully and unjustly persuaded, procured, and enticed* the said wife to depart and absent herself from the plaintiff, and to secrete herself from him, *by means of which persuasion, procu-*

ration, and enticement the said Mary on the said 8th of August departed and absented herself from the plaintiff without the plaintiff's consent, and continued absent until her death, &c.; whereby the plaintiff, &c. (as in the first count).

The third count stated that on the 8th of August, 1742, the plaintiff's wife, without and against his consent, went away from him, and went to the defendant; yet the defendant, well knowing the said Mary to be the wife of the plaintiff, received her, and concealed her from the plaintiff, and kept her so concealed from him until the time of her death, and wholly refused to deliver her to the plaintiff or to discover her place of residence (although on, &c., at, &c., he was requested, &c.), but unlawfully entertained, harbored, concealed, and secreted her from the plaintiff from the 8th of August, 1742, until the time of her death; whereby the plaintiff, &c. (as before, only omitting that the plaintiff was deprived of the benefit of the fortune, &c.).

The fourth count stated that the defendant harbored and concealed the plaintiff's wife until her death, and also caused her to be buried secretly, and kept her death a secret from the plaintiff for a year after her death, &c., whereby the plaintiff lost the comfort and society of his wife from the said 8th of August until the time of her death, and the benefit of her fortune, &c.

The defendant pleaded not guilty; and the jury found a verdict for the plaintiff on the first three counts, and gave 3,000*l.* damages, and a verdict for the defendant on the last.

This case was argued on the 18th and 26th of November, 1745, and the 29th of January following, by *Skinner* and *Willes*, King's Serjeants, and *Draper* and *Hayward*, Serjeants, for the defendant, in support of the motion in arrest of judgment, and by *Prime* and *Birch*, King's Serjeants, and *Booth*, Serjeant, for the plaintiff; and on the 1st of February following the rule to arrest the judgment was discharged.

WILLES, Lord Chief Justice, delivered his opinion to the following effect:—

Several objections have been taken by the defendant to this declaration in arrest of judgment; two general ones, and three to the particular penning of the declaration. I admit the rules laid down in most of the cases that were cited, and therefore shall have occasion to mention only a few of them, because they are not applicable to the present case.

The first general objection is, that there is no precedent of any such action as this, and that therefore it will not lie ; and the objection is founded on Lit. § 108, and Co. Lit. 81 *b*, and several other books. But this general rule is not applicable to the present case ; it would be if there had been *no special action on the case* before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy ; but there must be new facts in every special action on the case.

The second general objection is, that there must be *damnum cum injuria*, which I admit. I admit likewise the consequence, that the fact laid before *per quod consortium amisit* is as much the gist of the action as the other ; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By *injuria* is meant a *tortious* act ; it need not be wilful and malicious ; for though it be accidental, if it be tortious, an action will lie.

This rule, therefore, being admitted, the only question is whether any such injury may be laid here ; and this rule will properly come to be considered under the several objections made to the particular counts ; for if any of them hold, then no injury is laid. I admit, also, that as the verdict is on the three counts, and the damages are entire, if either of the counts be bad, the judgment must be arrested. To the second count no objection was taken.

But the counsel for the defendant began with the third count, to which they took several objections, which are all false in fact.

1st. That it is not laid that the wife went away without the husband's consent ; but it is expressly so laid.

2d. That it is not laid that the defendant knew of it ; but it is laid in express terms that he did, and that knowing it he concealed and detained her.

3d. That no request by the plaintiff to the defendant to deliver up the wife and refusal by the defendant are laid. It is not necessary to determine in this case whether a request and refusal were necessary, because both are expressly laid here ; but, according to my present thoughts, in the case of a *detainer* I think them necessary. And as not guilty to the whole is pleaded in special actions on the case, it puts every fact that is

laid in issue, I think it is likewise necessary to prove the request and refusal; and we must take it that this was so proved at the trial, the jury having found a verdict for the plaintiff.

The principal objections were to the first count, and they were three: —

1st. That *procuring*, *enticing*, and *persuading*, are not sufficient, if no ill consequence follows from it.

2d. That *unlawfully and unjustly* will not help the case; but the particular methods made use of should have been stated by which the defendant procured, &c., otherwise this is leaving the law to a jury.

3d. That no notice or request is laid, which is necessary in the case of the continuance, though it be not necessary if the defendant had at first persuaded her.

To the first there were two answers: —

1st. That here is a consequence laid, that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune, &c.

2d. Whether “enticing” goes so far or not I will not nor need determine, because “procuring” is certainly “persuading with effect.” I need not cite any authorities for this; because every one who understands the English language knows that this is the common acceptance of that word.

But, to be sure, it must be *an unlawful procuring*, and that brings me to the second objection. It is not necessary to set forth all the facts to show how it was unlawful; that would make the pleadings intolerable, and would increase the length and expense unnecessarily. It was said, however, that at least it was necessary for the plaintiff to add “by false insinuations;” but it is not material whether they were true or false; if the insinuations were true, and by means of those the defendant persuaded the plaintiff’s wife to do an unlawful act, it was unlawful in the defendant.

In answer to the objection that this is leaving the law to the jury, it must be left to them in a variety of instances where the issue is complicated, as *burglariter*, *felonice*, *proditore*, *devisavit vel non*, *demisit vel non*. But the judge presides at the trial for the very purpose of explaining the law to the jury, and not to sum up the evidence to them.

As to the distinction between the beginning and continuance

of a nuisance by building a house that hangs over or damages the house of his neighbor, that against the beginner an action may be brought without laying a request to remove the nuisance, but that against the continuer a request is necessary, for which Penruddock's Case, 5 Co. 100, 101, was cited, and many others might have been quoted, — the law is certainly so, and the reason of it is obvious. But that reason does not extend to the present case; because every moment that a wife continues absent from her husband without his consent, it is a new tort, and every one who persuades her to do so does a new injury, and cannot but know it to be so.

Several arguments were urged and several cases were cited on both sides on the question whether defects in this declaration were or were not aided by the verdict; but I shall not take notice of them, because I am of opinion that there are no defects to be cured, and that the declaration would have been good even on a demurrer. Had the words "unlawfully and unjustly" been omitted, this question might have been material, because it is lawful in some instances for the wife to leave the husband; but as the declaration is framed, it is not necessary to enter into the consideration of that question. Many observations were likewise made on the *quantum* of the damages given by the jury, and it was said that it was uncertain whether or not the husband had sustained any. Those were proper observations on the motion for a new trial (which has been already disposed of), but cannot have any weight on this motion in arrest of judgment, where every thing laid in the declaration must be taken to have been proved. I can see no reason to arrest this judgment, and therefore I am of opinion that the rule must be discharged.

ABNEY and BURNETT, JJ., gave their opinions *seriatim*, agreeing with the Lord Chief Justice.

Rule discharged.

Enticing Wife away from Husband. — Actions for injuries of this class began with the principal case. The declaration was doubtless suggested by that in use in actions for enticing away and harboring servants, as will be further seen upon a comparison with Lumley v. Gye, *ante*, p. 306. Indeed, by the early common law the wife was considered as the mere servant and property (in some sense) of the husband; but the damages allowed in the above case, as well as some of the chief allegations of the declaration, show that this had ceased to be true at least a hundred and thirty years ago.

We have omitted from *Winsmore v. Greenbank* one point very shortly decided and scarcely argued, to wit, that the declarations of the wife, apparently as to the cause of her leaving the plaintiff, were inadmissible. In other cases, letters written by the wife *before* the seduction have been held admissible to show the affection of the wife for her husband. *Edwards v. Crock*, 4 Esp. 39; *Trelawney v. Coleman*, 1 Barn. & Ald. 90; *Houliston v. Smith*, 2 Car. & P. 22, 24; s. c. 3 Bing. 127. And the same is held where the letters were written to a third person and not to the husband, notwithstanding a strong opposition of counsel to extending the rule. *Willis v. Bernard*, 8 Bing. 376. And in *Gilchrist v. Bale*, 8 Watts, 355, it was held that the wife's declarations, made immediately before and at the time she left her husband, were admissible in favor of the defendant, to show that the plaintiff had treated her cruelly. See also *Bennett v. Smith*, 21 Barb. 439. Evidence of the wife's feelings towards the plaintiff *after* the criminal conversation are not admissible. *Wilton v. Webster*, 7 Car. & P. 198. Indeed, the evidence must relate to a period anterior to the existence of any facts tending to raise suspicions of her misconduct, and when there existed no ground for collusion. *Edwards v. Crock*, 4 Esp. 39. And in the case of letters, the time when they were written must be accurately shown, which may be proved by the postmarks, but not by the dates. *Ib.*; 2 Greenleaf, Evidence, § 56.

It is also to be observed of *Winsmore v. Greenbank*, that the *dictum* upon the third count of the declaration — that a request for the wife is necessary before suit, where she goes away

of her own accord and carries with the defendant without any "enticing" or "procuring" of his — has met with some disapproval. In *Gilchrist v. Bale*, *supra*, the point was raised; but the court did not deem it necessary to examine the question, since the case before them was one of an actual enticing away by the defendant. In *Ferguson v. Tucker*, 2 Har. & G. 182, which was an action for harboring an absconding apprentice, after knowledge of his apprenticeship, the opinion of Willes, C.J., was denied. "Although at the time of the hiring," said the court, "*Ferguson* [the defendant below] may have been ignorant of the apprenticeship of Holland, yet if, after obtaining that information, he continued to harbor him, he is liable to an action at the suit of the master, without any proof of either demand or refusal. Whether the knowledge be possessed before the hiring or after the hiring is immaterial, either as we regard the nature of the injury or its consequences upon society. As soon as the new master acquires the knowledge, he is bound to discharge the apprentice, that he may not hold out to him an inducement not to return to his original master. And his obligation is equally imperious whether the master remain in total ignorance where his apprentice may be found, or, knowing that fact, make a regular demand of him."

This, indeed, seems to be the English law concerning the harboring of servants who have wrongfully left their masters. See *Blake v. Lanyon*, 6 T. R. 221, cited by the Maryland court, and *Lumley v. Gye*, *ante*, and especially the cases reviewed in the dissenting opinion of Coleridge, J., 2 El. & B. 244. But these cases come within the Statute of Laborers, 25 Edw. 3, st. 1; and

it is pretty clear from those considered by Coleridge, J., as above cited, that before the statute no action lay for merely receiving the servant. *Quære*, then, whether the *dictum* of Willes, J., is wrong, if indeed any analogy can be found in the case of harboring absconding servants; as to which see *Philp v. Squire*, *infra*, per Lord Kenyon, and the grave remark of Lord Ch. Campbell, that a wife is not a servant. *Lynch v. Knight*, 9 H. L. Cas. 577, 589.

However this may be, the main point decided in *Winsmore v. Greenbank*, the ruling upon the first count, for which the case is principally presented, has been often followed, and is settled law. *Weedon v. Timbrell*, 5 T. R. 357; *Hutcheson v. Peck*, 5 Johns. 196; *Barbee v. Armstead*, 10 Ired. 530; *Bennett v. Smith*, 21 Barb. 439; *Friend v. Thompson*, *Wright*, 686; *Rabe v. Hanna*, 5 Ohio, 530; *Barnes v. Allen*, 1 Keyes, 390; *Hernance v. James*, 32 How. Pr. 142; s. c. 47 Barb. 120.

In *Barber v. Armstead*, one of the defendants, who was the mother of the plaintiff's wife, had enticed away the wife, and afterwards the other defendant entered into an agreement with the plaintiff to keep his wife and child at his own house, and to raise, educate, and provide for the child; and that he should not be liable for the enticing away. The mother was not a party to the agreement, though she appeared to have approved of it. The agreement was afterwards rescinded by the plaintiff, and a demand made for his wife. Upon refusal he brought an action, and the court held him entitled to recover. The agreement, it was said, was not a contract for separation, but merely a license to harbor the wife and child, securing the party from responsibility

until it should be revoked; even if it was not void as against public policy.

In *Hutcheson v. Peck*, which was an action against the wife's father for enticing away the plaintiff's wife, the evidence was not clear in support of the declaration; but a majority of the court held that, admitting the proof to be strong enough to support an action against any one else than a parent, it required stronger evidence of bad motives to support an action against the wife's father. "I should require," said Kent, C. J., "more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from improper motives. Bad or unworthy motives cannot be presumed. . . . The *quo animo* ought, then, in this case, to have been made the test of inquiry and the rule of decision. The judge told the jury that if the defendant was not actuated by improper motives, it would go very far in mitigation of damages. I think the instruction should have gone farther, and the jury have been informed that in such a case the verdict should be for the defendant." A new trial was accordingly granted. See *Bennett v. Smith*, 21 Barb. 439, where it was held that a father is justified in advising his daughter to leave her husband, though the advice be given upon information which subsequently turned out to be untrue. The liability in such cases was to be determined by the motives which prompted the parent's action.

The difference, then, between an action against a parent and one against another for enticing away the wife, seems to be that in the former case the act may be justified, while in the latter it cannot be. But *quære*, whether

merely *advising* a wife to leave her husband upon her representations of ill-treatment by her husband, would be actionable? Of course, evidence is admissible to show whether the defendant *intended to entice* away the wife; as where she had been accustomed to ride with him to his house to visit his family, to whom she was related. *Schuneman v. Palmer*, 4 Barb. 225.

The doctrine of Kent, C. J., above quoted, that bad motives on the part of a parent will not be presumed, seems, however, objectionable. See also *Campbell v. Carter*, 6 Abb. Pr. n. s. 151. The effect of it is to cast the burden upon the defendant of proving more than the mere enticement. But as the plaintiff is, *prima facie*, entitled to the *consortium* of his wife, he who deprives him of it must be at least *prima facie* in the wrong. And this must be equally true of the wife's parents: for they have no more right to interfere with the husband's marital relations than have others. The burden should therefore be upon the parent to justify his conduct by proving both the ill-treatment and also that his own conduct was actuated by proper motives. It is probably otherwise where the daughter was not enticed away, but merely sheltered, since such an act is not wrongful. *Rabe v. Hanna*, 5 Ohio, 530; *Barnes v. Allen*, 1 Keyes, 390.

Indeed, it is difficult to see any distinction in favor of the parent over any other person in this particular. It is laid down as a general rule that every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbor her, is liable to an action for damages, unless the husband has, by his cruelty or mis-

conduct, forfeited his marital rights, or has turned his wife out of doors, and compelled her to leave him. *Addison, Torts*, 905 (4th ed.). It is clearly to be implied from this that, when the wife has thus been compelled to leave her husband, *any one* may receive her without incurring liability. And so it was held by Lord Kenyon in *Philp v. Squire, Peake*, 82. In this case it appeared that the plaintiff's wife had gone to the house of the defendant, to whose wife she was related, and had represented that she had been very ill-treated by her husband, and turned out of doors. Upon this representation merely (there was no *proof* of ill-treatment) the defendant received her, and, at her request, suffered her to remain there after he had received notice from the plaintiff not to harbor her. Lord Kenyon observed: "The ground of this action is that the defendant retains the plaintiff's wife against the inclination of her husband, whose behavior he knows to be proper, or from selfish and criminal motives. But where she is received from principles of humanity, the action cannot be supported. If it could, the most dangerous consequences would ensue; for no one would venture to protect a married woman. It is of no consequence whether the wife's representation was true or false. This kind of action materially differs from that of harboring an apprentice, the ground of the action in that case being the loss of the apprentice's service."

And in a subsequent case of the same kind, Lord Kenyon held that if a husband ill-treat his wife, so that she is forced to leave his house through fear of bodily injury, a person may safely, nay, honorably, he added, receive and protect her. See also *Turner v. Estes*,

8 Mass. 317; *Schuneman v. Palmer*, 4 Barb. 225.

The gist of the action is the loss of the *consortium* of the wife, under which are commonly included her affection, comfort, society, and assistance; but it is not necessary to the maintenance of the action that there should be any pecuniary injury to the husband. It was so decided upon demurrer to the declaration in *Hernance v. James*, 47 Barb. 120, s. c. 32 How. Pr. 146, upon the authority of *Ashhurst, J.*, in *Weedon v. Timbrell*, 5 T. R. 357. See also *Barnes v. Allen*, 1 Keyes, 390, 394.

Seduction of Wife.—The action for seducing a man's wife, implying, as seduction does, an alienation of the wife's affection for her husband, rests upon the same ground, of the loss of *consortium*, and can therefore be maintained without proving any pecuniary damage. See *Weedon v. Timbrell*, 5 T. R. 357; 2 Greenleaf, Evidence, § 40, note, where the form of the declaration is given. In *Weedon v. Timbrell*, it was held that an action for criminal conversation with the plaintiff's wife, which had taken place after a separation of the husband and wife by mutual consent, could not be maintained; though an unreported case before Lord Mansfield (*Warrington v. Brown*) was referred to on the agreement, apparently inconsistent with such a decision.

The doctrine of the judges in *Weedon v. Timbrell* would probably be true if the separation had been made upon articles of agreement, in which the husband released all claim to the person of his wife. *Chambers v. Caulfield*, 6 East, 244; *Winter v. Henn*, 4 Car. & P. 494; *Wilton v. Webster*, 7 Car. & P. 198; *Harvey v. Watson*, 7 Man. & G. 644. But if the separation was without any relinquishment by the hus-

band of his right to the society of the wife, and he could still sue for a restitution of conjugal rights, it is no bar to the action. *Harvey v. Watson*, *supra*; s. c. 2 Roper, Husb. and Wife, 323, note; *Chambers v. Caulfield*, *supra*; 2 Greenleaf, Evidence, § 51, and note.

In *Wyndham v. Wycombe*, 4 Esp. 16, Lord Kenyon laid down the rule that if a husband neglect the society of his wife, and live openly in (apparent) adultery with other women, he could not bring an action for criminal conversation with his wife; and he said he had previously so ruled in an unreported case. *Sturt v. Blandford*. But subsequently Lord Alvanley overruled this doctrine, and held that such evidence went only in mitigation of the damages. *Bromley v. Wallace*, 4 Esp. 237. He was of opinion, as he is reported, that the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife. That alone which struck him as furnishing a defence was, where the husband was accessory to his own dishonor; he could not then complain of an injury which he had brought upon himself, and had consented to; but the fact that the wife had been injured by the husband's misconduct could not warrant her in injuring him in that way, which was the keenest of all injuries.

It might be added to this, that the husband might afterwards cease his infidelity and desire to return to the companionship and comfort of his wife; which the defendant has perhaps rendered impossible.

But though the criminal conversation be effected without any seduction, as where the wife is a woman of loose character, an action may, it seems, be maintained for the ravishment without alleging *per quod consortium amisit*.

Rigaut v. Gallisard, 7 Mod. 78, 82; *Sanborn v. Neilson*, 4 N. H. 501. The previous character of the wife would, however, be proper evidence in mitigation of damages: *Conway v. Nicol*, 34 Iowa, 533; 2 Greenleaf, Evidence, § 56; and if the husband suffered no pecuniary injury, as from the wife's sickness, desertion, or loss of assistance, it would seem that the damages could only be nominal. *Ib.* The subsequent conduct of the wife cannot be proved. *Elsam v. Faucett*, 2 Esp. 562. But prior acts of intercourse, even beyond the period of limitation, are admissible if the suit is for a wrong within the period. *Conway v. Nicol*, *supra*.

And, of course, if the husband permits the wife to live as a prostitute, he cannot maintain an action for criminal conversation with her. *Sanborn v. Neilson*, 4 N. H. 501. And the same is true where there is collusion or connivance on his part. *Rea v. Tucker*, 51 Ill. 110. But mere negligence, inattention, confidence, or dulness of apprehension, are not sufficient; the plaintiff's conduct must amount to at least a passive acquiescence and consent. 2 Greenleaf, Evidence, § 51.

If the evidence falls short of actual connivance and only establishes negligence, or even loose and improper conduct, not equivalent to consent, in the husband, though this is no bar to the action, it may be received in mitigation of damages. *Ib.* § 56; *Foley v. Peterborough*, 4 Doug. 294. But see *Duberley v. Gunning*, 4 T. R. 651. As to the damages in the latter case see *Jones v. Sparrow*, 5 T. R. 257; *Chambers v. Caulfield*, 6 East, 244; *Blunt v. Little*, 3 Mason, 102, 106. In *Duberley v. Gunning*, the defendant had proved many indecent familiarities between himself and the wife in the presence

of the plaintiff; but though \$5,000 damages had been awarded, the court mistakenly refused to set aside the verdict. It seems clear, however, where there has been no improper conduct on the part of the plaintiff, that exemplary damages may be given, whether the action be for criminal conversation or for enticing away; upon the analogy of the action for the seduction of a minor daughter. See *ante*, p. 294.

Condonation, though a sufficient answer to a suit for divorce brought on the ground of adultery, is not a defence to an action for criminal conversation. *Sanborn v. Neilson*, 4 N. H. 501. And the action lies though the husband did not know of his wife's dishonor until it was disclosed to him by her while lying fatally sick, and though he continued to attend kindly until her death. In such case the jury may give damages for the shock to his feelings and for the implied loss of society down to the wife's decease. *Wilton v. Webster*, 7 Car. & P. 198.

Proof of Marriage.—In actions for criminal conversation it is necessary, in England, at least, for the plaintiff to prove a marriage in fact between himself and the woman. *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, 1 Doug. 171; *Hemmings v. Smith*, 4 Doug. 33. And it is apprehended that the same rules prevail as to marriage in an action for merely enticing away; but *quære* in this case if the plaintiff, failing in his proof, could not amend his declaration, as for loss of service, and recover upon proof of service, though rendered *gratis*. See *Harper v. Luffkin*, 7 Barn. & C. 387; *Evans v. Walton*, Law R. 2 C. P. 615; and *ante*, p. 303, note.

In *Morris v. Miller*, the plaintiff

proved articles between himself and the woman, made after the alleged marriage, for the settlement of the wife's estate; also cohabitation, name, and reception of the woman as his wife. But this was done *aliunde* the register (which was supposed to be unavailable) and without the minister, who had been transported, or the clerk, who was dead. There was also evidence of a confession by the defendant to a third person that the woman was the plaintiff's wife. But the court held that all this was not sufficient. The action was said to be a sort of criminal case, and was compared to a prosecution for bigamy, in which it was said there must be proof of something more than had been proved in this case, a marriage in fact being necessary.

In the subsequent case of *Birt v. Barlow*, it was held that a copy of the register was admissible evidence of the marriage; though the judge at *nisi prius* had supposed the law to be otherwise.

In this case Lord Mansfield explains what was meant by the term "marriage in fact" as used by him in *Morris v. Miller*. "I say marriage *in fact*, because marriages are not always registered. There are marriages among particular sorts of dissenters, where the proof by a register would be impossible; and Denison, J., in a case of that kind which became before him admitted other proof of an actual marriage." See also *Catherwood v. Caslon*, 13 Mees. & W. 261, that the marriage must be actually, and not merely *prima facie*, valid where it was celebrated.

The doctrine, therefore, seems to be merely this, that what is by law the best evidence should be produced when practicable. When this cannot be done (the fact not being imputable to the plain-

tiff), secondary evidence may be given. But Professor Greenleaf agrees with Lord Mansfield, that evidence of cohabitation, reputation, and the like circumstances, from which marriage is only to be inferred, is incompetent. 2 Evidence, § 49.

It should be observed that in *Morris v. Miller* counsel objected to the admission of marriage by the defendant, on the ground that it only amounted to an inference from reputation. But the learned writer last cited expresses a doubt whether such admissions are not sometimes evidence; and he cites several cases where admissions of marriage have been received. *Dickinson v. Coward*, 1 Barn. & Ald. 679; *Rigg v. Curgenvin*, 2 Wils. 399; *Forney v. Hallacher*, 8 Serg. & R. 159; *Catherwood v. Caslon*, 13 Mees. & W. 261. But the evidence must be direct and clear; and, therefore, where the defendant, being asked where the plaintiff's wife was, replied that she was in the next room, this was held insufficient to prove a marriage. Bull. N. P. 28. Where, however, the defendant deliberately declared that he knew that the woman was married to the plaintiff, and that with full knowledge of that fact he had seduced her, this was held competent evidence of marriage. *Forney v. Hallacher*, 8 Serg. & R. 159.

Evidence of reputation has been held admissible in this country in an indictment for incest, to prove the relationship of the parties. *Ewell v. State*, 6 Yerg. 364. So, in prosecutions for bigamy or adultery, it is held that proof of marriage in fact is not necessary, admissions of the defendant being sufficient. *Cook v. State*, 11 Ga. 53; *State v. McDonald*, 25 Mo. 176; *State v. Medbury*, 8 R. I. 543. See also *Warner v. Commonwealth*, 2 Va. Cas.

95; Commonwealth v. Horton, 2 Gray, proof of a criminal intercourse between
354; Commonwealth v. Belgard, 5 the defendant and the female, is suffi-
Gray, 95. . cient to go to the jury without absolute

To establish the *identity* of the re- proof of identity. Hemmings v. Smith,
puted wife, evidence of a marriage *de* 4 Doug. 83. See also Birt v. Barlow,
facto and cohabitation, followed by 1 Doug. 170.

TRESPASSES UPON PROPERTY.

CUTTS v. SPRING, leading case.

MURRAY v. HALL, leading case.

Note on Trespasses upon Property.

Historical aspects of the subject.

Possession and property.

Possession as to wrong-doers.

Injuries to reversion.

Constructive possession.

Cotenants.

Mesne profits. Entry.

Injuries to personalty.

WILLIAMS v. ESLING, leading case.

ANTHONY v. HANEY, leading case.

MALCOM v. SPOOR, leading case.

Note on what constitutes a Trespass.

THOMAS CUTTS and Others v. THOMAS SPRING and Others.

(16 Mass. 185. Supreme Court, Massachusetts, May Term, 1818.)

Possession under Invalid Title. A grantee of land from the Commonwealth takes possession of more land than he is entitled to hold under his grant. A trespass is committed on a part of the premises afterwards resumed by the Commonwealth. *Held*, that the grantee was entitled to his action for the trespass, he being answerable to the Commonwealth in a suit for the mesne profits, or in some other way.

TRESPASS *quare clausum fregit*, and for cutting timber on a tract of land in Hiram, in the county of Oxford. On the general issue joined, trial was had at the last October term, before Thatcher, J. The plaintiffs proved the cutting of the trees on the land described, their title to which they derived as follows: In 1771 the government of this then province granted to one Benjamin Prescott a certain tract of land, which he caused to be surveyed, and upon which he entered. In 1809, his son, Henry P., conveyed the south-easterly half thereof to the plaintiffs, who entered, and became seized and possessed thereof, including the *locus in quo*.

The defendants offered to prove that, since the trespass was committed, the Commonwealth had recovered judgment upon an

inquest of office against the plaintiffs, upon the ground that they, as assignees of said Benjamin, held and claimed more lands than they were entitled to hold under the said grant; and that commissioners, appointed pursuant to law, had assigned to the plaintiffs a tract of land, being part of what they claimed to hold, but not including the *locus in quo*. The judge refused to admit this evidence; and a verdict was returned for the plaintiffs, which was to be set aside and a new trial had, if the said evidence ought to have been admitted.

Mellen and Adams, for the defendants, argued that the plaintiffs, although in possession at the time of the trespass, were to be considered merely as tenants at will to the Commonwealth; and that the Commonwealth being the party injured, the plaintiffs could claim at most but nominal damages. 11 Mass. Rep. 519, *Starr & al. v. Jackson*. In the case referred to, the court say: "A disseizee may maintain trespass for injurious acts subsequent to the disseizin, and while he was out of possession, after he has re-entered." But the case at bar is still stronger; for the Commonwealth cannot be disseized, and is still entitled to its action against the defendants for this trespass done to its land while in the wrongful possession of the plaintiffs.

Longfellow, for the plaintiffs. The defendants are mere strangers to the title in this land. The plaintiffs were not tenants at will. They were seized in fee against all the world, except the Commonwealth. They, and those under whom they claimed, had been in the undisputed possession of the land for more than thirty years, which gave them the right of possession, which nothing short of an inquest of office could lawfully disturb. The Commonwealth could not have trespassed for this injury, while the plaintiffs were thus possessed of the land: 1 East's Rep. 244, *Graham v. Peat*; for possession is necessary to support such action. The case of *Starr & al. v. Jackson* shows only that a tenant of the freehold can maintain trespass, although there be a tenant at will. It is not known to have been decided here that the Commonwealth cannot be disseized. The plaintiffs, however, always considered themselves as holding adversely to the Commonwealth, and not as tenants at will to it.

BY THE COURT. The grant of the government to B. Prescott in 1771, and his surveying, fixing the bounds, and entering upon the land, gave him a seizin, although he included more land

within his location than his grant conveyed to him. His title descended, with the possession, to his son, and the deed of this latter conveyed the seizin to the plaintiffs in 1809.

It is wholly immaterial to the defendants whether the location covered more land than the terms of the grant would warrant. The plaintiffs were seized as well as possessed, in regard to every one but the Commonwealth, who might, or might not, reclaim part of the land located, as not conveyed.

The action, therefore, is rightly brought, and the value of the trees is the proper measure of the damages. For the Commonwealth has a right to call the plaintiffs to account, by a suit for the mesne profits, or in some other way; and as the defendants were wrong-doers to the plaintiffs, these latter ought to be in possession of the value of the trees, as a fund to meet the claim of the Commonwealth. If not called upon, they have a right to keep the money for their own use, being accountable to none but the Commonwealth.

Judgment on the verdict.

MURRAY v. HALL.

(7 C. B. 441. Common Pleas, England, Hilary Vacation, 1849.)

Cotenants. Trespass *quare clausum fregit* lies by one of several tenants in common against his cotenant, where there has been an actual expulsion.

THIS was an action of trespass for breaking and entering the dwelling-house of the plaintiffs, and expelling them therefrom, and seizing and converting their goods.

The defendant pleaded, first, not guilty; secondly, as to the breaking and entering the dwelling-house, leave and license; thirdly, that the premises were not the premises of the plaintiffs; fourthly, as to the goods, leave and license; fifthly, that the goods were not the goods of the plaintiffs: upon which issue was joined.

The cause was tried before Maule, J., at the sittings at Westminster, in Easter Term, 1847. The facts that appeared in evidence were as follows: The three plaintiffs and one Hart had jointly become tenants of the premises in question — a room

used as a coffee-room by the members of a temperance society—to one Hall. On the 23d of November, 1846, the defendant and Hart forcibly expelled from the premises a person named Adams, who had been placed there by Murray.

On the part of the defendant it was proved that Hart, on the 5th of November, 1846, surrendered his interest to the defendant by a document of which the following is a copy:—

“Mr. W. HALL.

“SIR, — The premises I and my copartners hold of you, being situated No. 11 Stacey Street, St. Giles's, I, in the name of the same, give up, as we cannot pay you the rent due, my copartners having misapplied the same. Yours, &c.,

“JOHN HART.

“P.S. — I have given the key to Mr. G. for you.”

It was then insisted for the defendant that the surrender by Hart at all events inured as a surrender of *his own* interest, and made Hall tenant in common with the three plaintiffs; and that one tenant in common could not maintain trespass against his companion, even for an actual expulsion. *Cubitt v. Porter* 8 B. & C. 257; 2 Mann. & R. 627. And see *Wiltshire v. Sidford*, 1 Mann. & R. 403. On the part of the plaintiffs it was objected that, since the new rules, a surrender must be pleaded specially. The learned judge told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the premises by the defendant, their verdict ought to be for the plaintiffs. The jury returned a verdict for the plaintiffs; damages 35*l*.

Wallinger, in the course of the same term, obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved.

Parry showed cause.

Channell, Serjt., and *Wallinger*, in support of the rule.

COLTMAN, J., now delivered the judgment of the court.

This was an action for breaking and entering the plaintiffs' dwelling-house, and expelling them therefrom, to which the defendant pleaded, first, not guilty; secondly, leave and license; thirdly, a denial that the dwelling-house was the plaintiffs'.

At the trial before Maule, J., one ground of defence was that the defendant was tenant in common of the house with the plain-

tiffs, and that therefore the action was not maintainable. The learned judge told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the house by the defendant, their verdict ought to be for the plaintiffs. The jury found for the plaintiffs; damages 35*l*.

The defendant afterwards obtained a rule to show cause why a nonsuit should not be entered (pursuant to leave given at the trial), on the ground that one tenant in common cannot maintain trespass against another, even though there has been an actual expulsion.

On showing cause, it was argued (before the Lord Chief Justice, and Justices Coltman, Cresswell, and V. Williams) that this defence, even if sustainable, ought to have been specially pleaded. It is unnecessary to give any opinion on this point, for we are of opinion that the defence is not sustainable.

The court has felt some difficulty on the question, by reason only of the doubts expressed by Littledale, J., in his judgment in *Cubitt v. Porter*, 8 B. & C. 269. That learned judge there said, that although if there has been actual ouster by one tenant in common, ejectment will lie at the suit of the other, yet he was not aware that trespass would lie; for that in trespass the breaking and entering is the gist of the action, and the expulsion or ouster is a mere aggravation of the trespass; and that, therefore, if the original trespass be lawful, trespass will not lie. It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established, in the case of *Goodtitle v. Tombs*, 3 Wils. 118, that a tenant in common may maintain an action of trespass for mesne profits against his companion, it appears to us that there is no real foundation for the doubts suggested.

We are, therefore, of opinion that the direction of Maule, J., at the trial, was right; and consequently this rule must be discharged.

Rule discharged.

Historical. — Whether trespasses the trespass operated, or could be upon lands, not in the nature of a disseizin, were subjects of civil redress before the time of Bracton we are not able certainly to determine. Where treated by election, as a disseizin, redress was obtained by an assize of novel disseizin. So, too, for certain nuisances to a man's freehold an assize

was the remedy. Glanvill, lib. 13, c. 34, 35. See note on Nuisance.

In the time of Glanvill, questions relating to lands, when not tried by battle, were tried by an assize;¹ the assize being a jury to decide the right to seizin. The term "trial by jury" had then a technical signification, and embraced only issues not tried by an assize. The latter was itself a trial by jurors, like the former, but it signified the trial of a real action. Trial by jury, however, or, as it was more commonly called, a recognition, often occurred in the course of an assize; as where certain issues were formed on matters preliminary to the question of seizin. In such cases the sheriff was commanded to summon other jurors (recognitors) to try the issue. But whether every issue that might be raised in the course of an assize could be so tried does not appear. Glanvill himself mentions only a few cases for a recognition; such incidental issues being generally tried by battle. He makes no mention of issues of trespass under either mode of trial; and it does not appear whether at this time, if the act complained of were only a trespass, and could not be treated as like a disseizin, the demandant could recover judgment of damages. See as to the above, book 13 of Glanvill, and 1 Reeves's Hist. Eng. Law, pp. 352-354, Finl. ed.

In the time of Bracton, however, a considerable advance had been made. Besides the frequent substitution of the recognition for the trial by battle, a new and less cumbersome method of trying incidental questions in an assize had been adopted. Instead of summoning new jurors for the trial of every issue of fact that was raised in an assize,

the assize itself was turned into a jury (*assisa vertitur in juratam*) to try the question; and we now find the first mention of trespasses upon land. Bracton (lib. 4, c. 34, § 5, p. 216 b) says, "*Vertitur etiam assisa quandoque in juratam propter transgressionem;*" as where a person made use of another's land against the owner's will, or where he kept out his cotenants, in the case of land held in common, or where he was guilty of an abuse of land not his own; such acts were both a disseizin and a trespass. If the defendant had entered without a claim of right, says Bracton, the act was only a trespass and not a disseizin. But since it was uncertain with what intent the entry had been made, the plaintiff brought an assize, in which case the judge would determine of the intent, and if it appeared that the defendant had been led into the act *errore probabili vel ignorantia, sed non crassa*, and had so cut down trees or grass, but not in the name of seizin, the disseizin was excused, and the act considered only as a trespass; for which, if he confessed, he was to make amends; but if he denied the trespass, the assize was turned into a jury to inquire of the trespass, and by this the defendant was to stand or fall. See also 1 Nichols's Britton, 343. From which it appears that at this time, whatever may have been the case when Glanvill wrote, damages for trespass could be recovered in the assize, sitting as such; and this was probably so when the trial proceeded *per juratam*. At all events, *punishment (pœna)* could be inflicted. 216 b.

There was thus no need of a distinct action for mesne profits; which fact appears more fully from what is

¹ Or, after the time for the assize had passed, by a writ of right in the Lord's Court. Glanvill, lib. 9, c. 11-14.

stated in Britton. This author says that after judgment for the plaintiff in the assize, "let it be inquired of the jurors what damages the disseizors and the tenants have committed in houses, woods, gardens, warrens, vivaries, parks, rabbit-warrens, and elsewhere, and how much has or might have been by good husbandry received in the mean time of all kinds of issues of the tenement, and what profit in value the plaintiff might have had if he had not been disseized; and it shall be awarded accordingly that the plaintiff recover his full damages. And if the justices perceive that the jurors are disposed to relieve the disseizor by assessing light damages, because, on the other hand, they have made him suffer by the loss of the tenement, let the lands be extended by the same jurors at their true value in the presence of the parties, if they will be there; and according to the yearly value let the damages be taxed by the justices, single or double, according to the ordinance of our statutes, and according as the assize shall have been falsely defended or not."

1 Nichols's Britton, 857.

And it is added that if the disseizors have taken away or detained any thing from the plaintiff, he may have damages for this also in the assize, or bring an appeal of robbery or a writ of trespass. Ib. p. 358. See *infra*. (In Glanvill, a special writ is given, founded on the recovery of the land. Lib. 12, c. 18.) And damages could be taxed for injuries to the tenement which had happened without the fault of the disseizor, as for houses which had been burnt by accident. Ib.

In the time of Bracton the law was similar; and we are told that a triple punishment might follow the judgment in an assize of novel disseizin, to wit, cor-

poral punishment for the spoliation, pecuniary punishment for the unjust detention, and the same for the damages which the demandant had sustained *medio tempore spoliationis*. Bracton, 161 b. See also ib. 218 b.

But until the Statute of Gloucester, c. 1 (6 Edw. 1), passed about fifteen years before Britton wrote, the demandant's remedy was confined to the disseizor only; and the consequence was that, if he aliened or was disseized, his alienee or disseizor escaped. This statute remedied the defect in the common law, by providing that, "if the disseizors do aliene the lands, and have not whereof there may be damages levied, they to whose hand such tenements shall come shall be charged with the damages, so that every one shall answer for his time." This act also provided that the disseizee should recover damages as well in a writ of entry upon disseizin against the alienee of the disseizor. (The above act is further interesting as making the first provision for the recovery of costs. "And, whereas beforetime damages were not taxed but to the value of the issues of the land, it is provided that the demandant may recover against the tenant the costs of his writ purchased, together with the damages abovesaid. And this act shall hold place in all cases where the party is to recover damages." See 2 Inst. 283, 288).

The injured party was now fully protected, and there was no special need of the action of trespass for the breaking and entering, or for mesne profits, which in subsequent times became the common forms of remedy. There was, indeed, a writ of trespass *quare clausum fregit* in existence in the time of Bracton, but it was rarely used. Bracton disapproved of it, as

being a writ by which the mode of the fact was to be inquired of instead of the fact itself. 2 Reeves's Hist. Eng. Law, 216, 217, Finl. ed. (The passage in Bracton is not cited, and we have not been able to find it.) Assize was the ancient, and had been the universal, remedy for injuries to land. It was resorted to back in the time of Glanvill as well for indirect disseizins, by nuisance, for example, as for the ordinary disseizin of actual entry (see note on Nuisance); and now it was so much favored as to be brought even in cases of wrongful distress. Bracton, 217. And so it was afterwards in the time of Britton. 1 Nich. Brit. 344. See also Bracton, 210 b, c. 30, for other cases of assize.

In the reign of Edward 2 the action of trespass had gained ground, and numerous cases are reported where it was brought for injuries to lands; cases, too, in which the issue was upon soil and freehold in the plaintiff. Thus, in trespass for beating down a dove-house, the defendant pleaded that it was within his soil and freehold. The plaintiff objected that the question of freehold could not be tried in an action of trespass; and therefore he averred his writ, that the defendant had torn down his dove-house. The defendant then set forth his title; and the plaintiff was driven to reply to the special matter thus, that the defendant beat down the plaintiff's dove-house, in the plaintiff's soil, and not in the defendant's. 15 Edw. 2, p. 457. See also 3 Edw. 2, p. 63; 2 Reeves's Hist. Eng. Law, *ut supra*.

Trespass thus became in actual practice a concurrent remedy with assize for injuries to real property. But the injured party could not maintain both

actions at the same time. In one case the defendant, to trespass for breaking and entering the plaintiff's house and carrying away his goods, pleaded that an assize of novel disseizin was then pending in respect of the very same land and injury; and the plea was held good. 8 Edw. 2, p. 272.

There were some advantages in a proceeding by trespass over the assize, which may account for the general preference for the former action. If the sheriff returned *nihil habet* upon the distress warrant, a process of *capias* issued, upon application, and if the defendant could not be found in the county, a process of outlawry followed. 16 Edw. 2, p. 478; 1 Nichols's Britton, 129; Bracton, 440 b, 441; 1 Reeves's Hist. 454, 455, Finl. ed.; 2 ib. 218. (But trespass could not be maintained against a corporation, since a *capias* could not issue against it. 22 Lib. Ass. pl. 67.)

Trespass now began to be the common remedy where the injury was not a disseizin; and long before the time of Lord Coke it appears to have been the usual mode of redress for mesne profits after a disseizin. See Liford's Case, 11 Coke, 45, 51 b. And when the old real actions came to be superseded by the action of ejectment,¹ trespass, or *assumpsit* for use and occupation, was the only mode of obtaining satisfaction for the loss of the issues of the land during the disseizin. 1 Chitty, Pleading. See *infra*. The wisdom, however, of the early law in allowing a recovery in the real action of damages for such loss, thus saving the expense and delay of a double litigation, is obvious; and comparatively recent statutes have, in some of the States at

¹ It is curious to observe the transformation by which ejectment, from a simple action of trespass, in which damages only were sought, came finally to be an action for the recovery of the land only.² See 3 Reeves's Hist. Eng. Law, 177-180, 759-762, Finl. ed.

least, put the law again where it stood in the thirteenth century.

Of the many writs of trespass to lands the following may be selected as fairly representing the action: "The king to the sheriff, greeting. If A. shall make you secure, &c., then put, &c., B., &c., wherefore with force and arms he broke the close of him the said A., at N., and therein, without his license and will, chased, and took and carried away so many conies, of such a price, and other enormous things to him did, to the great damage of him the said A., and against our peace. And have there the names of the pledges and this writ. Witness," &c. Fitzh. Nat. Brev. 87. (The trespass was for the breaking and entering, and not for the conies. *Ib.*)

Where grass or crops were injured the writ ran: "Wherefore, &c., the herbage of him the said A., at N., lately growing, or the corn of him the said A., at N., lately growing, to the value of ten pounds, with certain cattle he depastured, trod down, and consumed, and other," &c.

Several acts of trespass were often united, thus: "Wherefore, &c., he broke the houses of him the said A., at N., and cut down his trees there lately growing, and fished in his fish-ponds there, and took and carried away the fish thereof and the trees aforesaid, and there took and impounded his beasts of the plough, and detained them so long time impounded that forty acres of land of the same A. for a great while remained untilld, and took and carried away the doves of his dove-cot there, with nets and other engines, whereby the same A. wholly lost a flight of his dove-cot, and other," &c. *Ib.* 88.

The gist of the action in these cases was the entry, and the other acts were only aggravation; and, therefore, it was but mitigation of damages for the

defendant to show that the plaintiff had not lost the goods: *ib.*, note *a*; *ib.* 87, note *a*; the law upon this point being the same as now.

In Bracton's time (as ever since) the possession of a wrong-doer was protected against strangers. 165, 166 *b*, 184, 184 *b*, 196. Comp. Dig. lib. 48, tit. 17, 2.

As to injuries to a man in respect of his goods, if the property was detained or stolen, the law (apart from redress in a real action) gave restitution in the one case by the writ of detinue or replevin, and in the other by an appeal of felony or by a writ of trespass. As to larcenies and robberies committed in time of peace, where the offenders were not freshly pursued with hue-and-cry, Britton says that the owners of the things should have their suit by appeal of felony within the year and day as in other felonies, but after that time their right of appeal was to cease, and the suit to belong to the king only. If the plaintiffs brought their suit in form of trespass, they were to be heard if they had not before begun suit in form of felony; and the judgment in trespass was a bar to an appeal by the king, though if the plaintiff abandoned his suit, it was otherwise. 1 Nichols's Britton, 118.

The difference between the two proceedings, in the result, was that in the appeal of robbery the thing taken was to be restored: 3 Reeves's Hist. 330, Finl. ed.; while in trespass, the plaintiff sought damages for the loss of his goods. The property could not, however, be recovered in the case of an indictment, until by the St. 21 Hen. 8, c. 11, the rule of the common law was extended. *Ib.* This statute provided, that if a man robbed or took away any money, goods, or chattels, from the person or otherwise, and was indicted, arraigned, and found guilty, or otherwise attainted, the person robbed or the owner of the

goods should have them restored. And similar statutes have been passed in more modern times in England. *Ib.*, note.

It is a reasonable conjecture that, where there was no recaption of the stolen goods, the earlier mode of redress and restitution was through this appeal of felony, and that trespass for such purpose was an after invention. See note on Conversion, *post*.

Trespass for goods taken and carried away was, however, a well-recognized action in the time of Edward 1, as appears from a record given in Ryley's Pleadings of Parliament, p. 125. This record contains a full recital of the proceedings in a case of this kind, from the writ to the award of the *venire*. It will also be found in 2 Reeves's Hist. 160, 161, Finl ed.

As in the case of injuries to lands, trespass for damage done to goods grew in frequency and in extent of application in subsequent reigns, and became one of the most common actions. Its history, however, presents little of peculiarity or interest, and it need not be further pursued.

The following are some of the old writs of trespass to goods: "The king, &c. If W. of S., master of the hospital of St. Michael of C., shall make you secure, &c., then put, &c., wherefore with force and arms he took and carried away the goods and chattels of the aforesaid hospital, to the value of one hundred shillings, found at R." &c. Fitzh. Nat. Brev. 89 G. If the chattel were a living thing, the allegation was *cepit et abduxit*, and not *asportavit*.

For wrongfully distraining and impounding beasts the writ ran thus: "Wherefore with force and arms he took the beasts of him the said A., at N., in your county, and chased them from that county into the county of

Kent, and impounded and there detained them impounded, contrary to the law and custom of our realm, and against our peace," &c.

The following writ lay for distraining a man by his beasts of the plough, or by his sheep: "Wherefore, seeing that it is appointed for the common profit of our realm that no man of the same realm may be distrained by the beasts of his plough, or by his sheep, for our or another's debt, or on another occasion whatsoever, by our or another's bailiffs or ministers, so long as he hath other beasts by which reasonable distress may be made upon him for levying those debts, except only those beasts which being found doing damage to any one shall happen to be impounded according to the law and custom of our realm; the aforesaid W. took and impounded the sheep of the aforesaid A., at N., or the beasts of him the said A., of his plough, at N., against the form of the statute aforesaid, and yet detains them there impounded against the law and custom, &c., and against the peace, &c. And have, &c. And in the mean time cause those beasts to be delivered to him, the said A." &c. "And so note," says Fitzherbert, p. 90, "that in this writ of trespass the sheriff shall make deliverance unto the party, as he shall do upon a replevin; and if the party hath the beasts delivered unto him before the writ sued, then this clause, 'cause those beasts in the mean time to be delivered to him the said A.,' shall not be in the writ."

For chasing sheep with dogs the writ was thus: "Wherefore with force and arms he chased one hundred sheep of him the said A., found at T., with certain dogs, inciting those dogs to bite the sheep aforesaid, insomuch that by the chasing and biting of the dogs aforesaid the said sheep were greatly injured,

and a great part of them cast their young, and made an assault upon T., his servant there, &c., by which," &c. Ib. To this there is the following note: "If my dog kills your sheep, and I freshly after the fact tender you the dog, you are without remedy. 7 Edw. 3, Barr. 290." See note on Dangerous Animals.

As to trespass in general, accessaries were not liable in the time of Britton (1 Nich. Brit. 130); but in the time of Edward 3, the rule prevailing in modern times was laid down, that there were no accessaries in trespass, all being principals. And it was held that, if a person assented to a trespass, after its commission, he was liable to the action. 38 Edw. 3, p. 18.

Previous to the passage of the St. of Westm. 2, c. 24 (13 Edw. 1), the writs of trespass in use were inadequate to many of the injuries to property; and one of the results of that statute was to remedy this defect. The writ of assize, as we have seen, was extended by the St. of Gloucester so as to give a right of recovery against alienees of the wrong-doer; but that act, as the term "assize" implies, was limited to certain cases of injuries to land, and other legislation was desired.

The St. of Westm. 2 was general, and provided that where a writ existed in one case and a thing happened in *consimili casu*, and needing a similar remedy, a writ should be made accordingly. A writ of nuisance against an alienee of the wrong-doer was given as an instance; the writ having previously lain only against the wrong-doer himself. Hence arose actions on the case; and though the examples given in the statute are of actions for injuries to land, the act was considered as extending to all classes of wrongs, and actions greatly multiplied under it.

Under this act reversioners now found a remedy for injuries to the inheritance committed by strangers, while before, the only writ which was in use was the writ of waste, which was directed against the tenant only. So, in the case of chattels which were in the possession of another, the owner now had an adequate mode of redress for injuries done by third persons. And so of all other infractions of legal rights to the damage of a man, for which there had previously been no writ.

In theory, a man's right of property (as well as other legal rights) was now secure, whether he was in possession or not, provided the injury extended to him. But how greatly the benefits of the statute were frittered away in endless and fruitless refinements as to the precise difference between the old writs and the new is too fresh in the memory of living lawyers to need comment. In some parts of this country, indeed, it has not yet become a memory: *Winkler v. Meister*, 40 Ill. 349 (1866); *Powers v. Wheeler*, 63 Ill. 29 (1872); for which there is far less excuse than there was when the difference between the use or omission of the words *vi et armis* might involve the right to a *capias* or a wager of law. (The process of *capias* did not issue in trespass on the case; and the defendant might wage his law under this class of writs, which he could not do in trespass *vi et armis*. 2 Reeves's Hist. 397, Finl. ed.)

In the remainder of this note, discarding the nearly obsolete distinctions between trespass and case, so far as they relate to the mere form of action, we propose to consider the circumstances under which a right of action, whether in trespass or case, may now be maintained for such injuries to property as are not the result of negligence; of

which hereafter. And, first, of questions pertaining to —

Possession and Property. (a.) Possession as to Wrong-doers. — The doctrine of the principal case, *Cutts v. Spring*, that possession is in general sufficient foundation for an action for an interference with one's enjoyment of property against all persons except the rightful owner, is abundantly sustained by the authorities. *Asher v. Whitlock*, Law R. 1 Q. B. 1; *Graham v. Peat*, 1 East, 244; *Demick v. Chapman*, 11 Johns. 132; *Cook v. Howard*, 13 Johns. 276; *Burrows v. Stoddard*, 3 Conn. 160, 431; *Outcalt v. Durling*, 1 Dutch. 443; *Brown v. Manter*, 22 N. H. 468; *Barnstable v. Thacher*, 3 Met. 239; *Slater v. Rawson*, 6 Met. 439; *Townsend v. Kerns*, 2 Watts, 180; *ante*, 349.

And these cases show that the rule is the same whether the property be real or personal.

This point is illustrated in those cases beginning with *Trevilian v. Pyne*, 1 Salk. 107, and *Chambers v. Donaldson*, 11 East, 65; in the latter of which it was held that in trespass upon land the justification of a command from the owner is traversable. Mr. Smith says that long after the decision in *Trevilian v. Pyne* (which was replevin for cattle) it was still thought, in accordance with the opinion expressed in that case, that in trespass *quare clausum fregit*, if the defendant justified under the command of A., in whom he alleged the freehold to be, the plaintiff could not in his replication traverse the command, because that would admit the freehold to be in A.; and, if the freehold were in A., the plaintiff ought not to have the action. 1 Smith's L. C. 471. But the law was settled otherwise in *Chambers v. Donaldson*. In that case, which was trespass *quare clausum*, the defendant

pleaded that the *locus in quo* was the freehold of P., and that by his command they broke and entered. The plaintiff traversed the command, and, on demurrer, the plea was held traversable; the ground taken being that otherwise a mere wrong-doer could interfere with another's possession, and by justifying under the owner save himself harmless; and this was not to be allowed, though the plaintiff in possession himself had no title as against the owner. See *Finch v. Alston*, 2 Stewt. & P. 83. But the cases above cited show that it is no defence to show title in a stranger; and the same is equally true in trespass *de bonis asportatis*. *Cooke v. Howard*, 13 Johns. 276, 284. The defendant must go further, and show that the act complained of was done under the authority of the owner.

If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and the question is which of the two is in actual possession, the answer is that the person who has the title is in actual possession, and the other person is a trespasser. *Maule, J.*, in *Jones v. Chapman*, 2 Ex. 803. See also *Barr v. Gratz*, 4 Wheat. 213; *Anonymous*, 1 Salk. 246; *Butcher v. Butcher*, 7 Barn. & C. 399; *Codman v. Winslow*, 10 Mass. 146; *Brimmer v. Proprietors of Long Wharf*, 5 Pick. 131; *Hunting v. Russell*, 2 Cush. 145. And if neither had title, it would seem, upon the principles already stated, that the one who first entered, if his possession were continuous, would be entitled to the possession as against the other. But *quare*, if the one who first entered had been actually evicted by the other, could he maintain an action for trespass committed subsequently by the latter?

Upon this subject see *Barnstable v. Thacher*, 3 Met. 239. In that case the plaintiffs had taken possession of a tract of unenclosed cranberry land, to which they had no title, forbidding all persons, by public notice, to take cranberries therefrom, except on certain prescribed terms, with which most persons had complied for several years. Before the plaintiffs took possession, one Hallett had claimed a right in the land, though he could show no title, and had been accustomed to take cranberries growing thereon, and continued to do so after the entry of the plaintiffs. The defendants claimed under a license from Hallett. It was held that the plaintiffs could not maintain an action for the interruption of their alleged right of possession. "Now, when two parties," said Mr. Justice Wilde, in delivering the judgment, "have a concurrent or mixed possession, and neither party has any other title, nor the exclusive priority of possession, neither party can maintain trespass against the other. We think, therefore, that, as Hallett had prior possession, he had a right to maintain it, notwithstanding the entry and claim of the town; and if he had entered claiming title, at the same time the town entered, and had continued to maintain concurrent possession, neither party, it seems, could maintain trespass." See also *Tappan v. Burnham*, 8 Allen, 70. But *quære* whether, as against the defendants, the plaintiff could not recover, for the former claimed only as licensees of Hallett. See *Wood v. Leadbitter*, 13 Mees. & W. 838, *infra*.

In cases of mixed possession, held in ignorance of the true boundary line, he in whom the title actually exists may maintain trespass against the other for

injuries committed upon the land. *Leach v. Woods*, 14 Pick. 461.

The devisee of one who had only a bare possession may also, it seems, maintain an action against a wrong-doer for disturbing his occupancy. See *Asher v. Whitlock*, Law R. 1 Q. B. 1, where the heir of such a devisee was held entitled to maintain ejectment against a stranger who had entered upon the land.

The doctrine of *Cutts v. Spring* does not apply, it seems, as to rights and things not capable of full possession. The editors of *Smith's Leading Cases*, indeed, say that it may, perhaps, be laid down generally that to rights lying in grant, and not susceptible of possession or seizin, there can be no title as against a wrong-doer where there is none against the party capable of granting such rights; excepting only where the right claimed is a natural incident of property which is in the possession of the claimant. And they give the following illustration: Thus, as a mere license confers no right at common law against the licensor, but only excuses that which, if not done under the license, would have been a wrong to him (*Wood v. Leadbitter*, 13 Mees. & W. 838), the licensee of that which might have been conferred as an easement or *profit-à-prendre*, cannot, it is apprehended, maintain an action against a wrong-doer for depriving him of the benefits which he might or would have enjoyed under the licensee. 1 *Smith's L. C.* 318 (6th Eng. ed.).

Hill v. Tupper, 2 Hurl. & C. 121, is cited in support of this proposition, and appears to sustain it. In that case an incorporated canal company had granted by deed to the plaintiff the sole and exclusive right or liberty to put or use

boats on the canal, and let them for hire; and the action was brought against the defendant for disturbing the exclusive right claimed under this deed. The court held that the plaintiff could not recover. Pollock, C. B., said: "After the very full argument which has taken place, I do not think it necessary to assign any other reason for our decision than that the case of *Ackroyd v. Smith*, 10 Com. B. 164, expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee. *This grant merely operates as a license or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right.*"

It is doubtful, too, if this doctrine that bare possession avails against a wrong-doer is true of rights or things which are not capable of full possession, even in favor of the *owner* of the soil. See *Whaley v. Laing*, 27 Law J. Ex. 327; s. c. 2 Hurl. & N. 476; 3 Hurl. & N. 675, 901. In this case, the declaration alleged that the plaintiffs were possessed of mines and of engines and boilers for working the mines, and used, had, and enjoyed the benefit and advantage of the waters of a branch canal, near the engines and boilers, to supply them with water; and that the water "used and ought to run and flow without being fouled or polluted, but that the defendant wrongfully fouled and polluted the water, and thereby injured the plaintiffs' engines." The defendant pleaded not guilty, and also traversed the allegation that the water ought to run and flow without being fouled or

polluted. The plaintiffs alleged no right to the water. The case was much litigated, and there was great diversity of opinion among the judges; but it was finally held by four judges against two (3 Hurl. & N. 901) that the declaration was bad in arrest of judgment, for want of an allegation that the plaintiffs were entitled to the full enjoyment of the water.

In *Hilton v. Whitehead*, 12 Q. B. 734, the declaration alleged that the plaintiff was possessed of a dwelling-house, and the defendant of coal-mines near to and under it; that the dwelling-house was supported in part by land between the same and the mines; and that the plaintiff "of right was entitled to and of right ought to have had his said dwelling-house so supported by the said land without the hindrance or disturbance of any person." It then alleged that the defendants so wrongfully and injuriously worked the mines as to loosen and disturb the support of the house. The declaration was held bad, after verdict, for not stating how it was that the plaintiff was entitled to have his house supported by the land above the mines.

In *Jeffries v. Williams*, 5 Ex. 792, however, which was decided two years later, a similar declaration was held good; but this was because there was nothing to show that the defendant owned the soil in which the mines were situated, for which reason he was considered, *prima facie*, a wrong-doer. The case appears to have been decided independently of *Hilton v. Whitehead*, that authority not being cited. See also *Wyatt v. Harrison*, 3 Barn. & Ad. 871; *Bibby v. Carter*, 4 Hurl. & N. 153.

(b.) *Injuries to Reversion*.—It is not necessary in all cases that the plaintiff

should have actual possession in order to maintain a suit for trespass. One who has a reversionary interest in lands or chattels may have an action for an injury to his interest. It was so held in *Ayer v. Bartlett*, 9 Pick. 156, as to chattels. That the same is true as to lands, see *Lienow v. Ritchie*, 8 Pick. 235; *Cannon v. Hatcher*, 1 Hill (S. Car.), 260; *Livingston v. Mott*, 2 Wend. 605; *Baxter v. Taylor*, 4 Barn. & Ad. 72. And this, too, against a licensee of the tenant; for such an injury is waste, which determines the tenancy. *Daniels v. Pond*, 21 Pick. 367, was the case of a removal of manure. See also *Lewis v. Lyman*, 22 Pick. 437, 442. So, too, an action lies by a mortgagee against one who removes trees under authority of the mortgagor, or a building erected on the land by the mortgagor after the execution of the mortgage. *Page v. Robinson*, 10 Cush. 99; *Cole v. Stewart*, 11 Cush. 181.

It is not material whether the property be in the possession of a tenant holding at will or otherwise. The nature of the tenancy does not affect the right of action of the reversioner; though under the old system of pleading it affected the form of his action. If the tenancy was at will, the owner sued in trespass; otherwise, in case. See *Star v. Jackson*, 11 Mass. 520; *Hingham v. Sprague*, 15 Pick. 102; *Livingston v. Mott*, 2 Wend. 605. That is, every trespass to the possession of a tenant at will is at common law as much an injury to the owner as to the tenant. It is otherwise now by statute in Massachusetts. See *Hastings v. Livermore*, 7 Gray, 194.

If the injury does not affect the reversion, the landlord cannot sue; the right of action belongs to the tenant. *Baxter v. Taylor*, 4 Barn. & Ad. 72;

Tobey v. Webster, 3 Johns. 468; *Davis v. Clancy*, 3 McCord, 422.

In *Baxter v. Taylor*, the plaintiff sued in case for an injury to his reversion. It appeared in evidence that the defendant had entered the close with horses and carts, and, after notice from the plaintiff to discontinue so doing, had claimed to do it in exercise of an unfounded right of way. The judge at *nisi prius* was of opinion that although there might be ground for an action by the plaintiff's tenant, the evidence did not show an injury to the reversion; and this ruling was held correct. The case of *Young v. Spencer*, 10 Barn. & C. 145, having been cited for the plaintiff, Taunton, J., said: "That was an action on the case in the nature of waste by a lessor against his own lessee. Here the action is by a reversioner against a mere stranger; and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant and to an action brought for an injury to the reversion against a stranger. *Jackson v. Pesked*, 1 Maule & S. 234, shows that if a plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto; and the want of such an allegation is cause for arresting the judgment. If such an allegation must be inserted in a count, it is material, and must be proved. Here the evidence was, that the defendant went with carts over the close in question, and a temporary impression was made on the soil by the horses and wheels. The damage was not of a permanent, but of a transient, nature; it was not, therefore, necessarily an injury to the plaintiff's rever-

sionary interest." As to the claim of a right of way, to the assertion that, if the action was held improper, this would be evidence of a right against the plaintiff in case of further controversy, the learned justice replied, "Acts of that sort could not operate as evidence of right against the plaintiff, so long as the land was demised to tenants, because, during that time, he had no present remedy by which he could obtain redress for such an act. He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it. As, therefore, he had no remedy by law for the wrongful acts done by the defendant, the acts done by him or any other stranger would be no evidence of right as against the plaintiff so long as the land was in possession of a lessee." See *Dougherty v. Stepp*, 1 Dev. & B. 371.

(c.) *Constructive Possession*:—An action may also be maintained where the possession of the plaintiff is only constructive. In *Davis v. Clancy*, 3 McCord, 422, it was held that evidence was proper which should make it appear that the person in actual possession of the premises had been put there merely as agent of the plaintiff, for the purpose of holding possession for the plaintiff and to protect the property from depredation. And it was said that though such agent were allowed to cultivate a part of the land for himself, while the part so cultivated might be considered as in his possession, so as to prevent an action by the owner for an injury not affecting the reversion, the rest was to be regarded as in the possession of the

landlord, so as to enable him to sue for any, the slightest, injury.

In *Bulkley v. Dolbeare*, 7 Conn. 232, the plaintiff sued in trespass for the cutting down and carrying away certain trees from his land which, it appeared, was in the actual possession of another; whether as a disseizor or tenant was not clearly shown. The action was upheld. The general property in the trees, it was said, was, after severance, in the plaintiff, the owner of the land. (See *Gordon v. Harper*, 7 T. R. 9, 11.) And it was established law that the person who had the general property in a personal chattel might maintain trespass for the taking of it by a stranger, though he never had the possession in fact; for a general property in a personal chattel draws to it a possession in law. Bro. Abr. Trespass, pl. 303, 341; Latch, 214; 2 Bulst. 268; Bac. Abr. Trespass, C. 2.

In accordance with the doctrine of the above cases, a party in possession of an enclosed piece of land may have an action for a trespass committed in his adjoining, though unenclosed, woodland. *Penn v. Preston*, 2 Rawle, 14; *Machin v. Geortner*, 14 Wend. 239. See also *Gambling v. Prince*, 2 Nott & McC. 138; *Jepherson v. Dryden*, 18 Pick. 385. (In the last named case it was held that a conveyance of land and a mill privilege by metes and bounds, "together with the privilege of a dam," gave the grantee such an interest in that part of the grantor's land not included within the metes and bounds, but upon which the dam extended, as would sustain trespass *quare clausum* against the grantor for cutting that part of the dam away.)

Another example of constructive possession is found in *Phelps v. Willard*, 16 Pick. 29. There the plaintiffs agreed to furnish one Burbank with a machine,

and to put it up in perfect order in the latter's mill. The latter was to cart the machine to his mill, and, if satisfied with it, to pay for it; otherwise the plaintiffs were to take it away. Before it was entirely put up and completed, it was tried, and did not in that condition give satisfaction. It was objected that the plaintiffs had not sufficient possession to maintain an action against an officer for attaching the machine as the property of the mill-owner; but the court ruled otherwise. According to the defendant's agreement, it was observed, the plaintiffs had a right to go into the mill to finish the machine, and the defendant could not maintain trespass *quare clausum* against them. "If a watchmaker," said the court, by way of illustration, "puts up a clock in a house, under an agreement that if it shall keep good time the owner of the house will purchase it, we think that until the trial is made the watchmaker remains in possession so as to be able to maintain trespass."

So, too, the proprietor of lands adjoining a public highway has such a possession of the way as to enable him to maintain an action for an unlawful ploughing of the same. The right of the public is merely that of an easement; while the owner retains his right in the soil. *Robbins v. Borman*, 1 Pick. 122. See also *Conner v. New Albany*, 1 Blackf. 88. And the owner of lands through which a turnpike road has been run may also maintain trespass against the turnpike corporation or its servants acting for it for the removal of herbage spontaneously growing by the roadside after the completion of the road. *Adams v. Emerson*, 6 Pick. 57. The *locus in quo*, the court observed in this case, although part of a turnpike road, is the soil and freehold of the adjacent owner,

subject merely to the public easement and the right of the turnpike corporation to construct a convenient pathway, and to keep it in good repair. To accomplish these purposes the corporation might dig and remove from place to place, within the limits laid out for the road, sand and gravel and turf; but the right of herbage, and the right to trees, mines, &c., belonged to the owner of the soil.

The owner of the land cannot maintain an action for the mere temporary and not improper obstruction of the road, however. *Mayhew v. Norton*, 17 Pick. 357; *O'Linda v. Lothrop*, 21 Pick. 292.

In *Bradish v. Schenck*, 8 Johns. 151, the defence to an action of trespass was that the plaintiff had let the *locus* on shares to a third person, and therefore had not possession. But the court held that the letting of land on shares, if for a single crop, did not amount to a lease; and the action was therefore considered proper.

It has been held that a widow remaining in the mansion-house, as allowed by statute, but having had no allotment of dower, cannot maintain an action for trespasses committed outside of the enclosure, though within the boundaries of the tract belonging to her late husband. *Carey v. Buntain*, 4 Bibb, 217. "Instances no doubt are frequent," said the court, "where an entry on part of a survey will operate to give a possession in fact of the whole, and proof of such an entry will be sufficient evidence of possession to maintain an action for trespass committed on any part. The present case appears not, however, to be of that character. Mrs. Buntain, the widow and plaintiff in the court below, cannot, according to any principle, have been possessed beyond the limits

of the plantation. At common law, it is true, she would be entitled to dower of the lands of the deceased husband, but she could thereby have had no several interest in any particular part; and according to the most approved authorities, until dower assigned, she had no right of entry. See 2 Bac. Abr. 375, and the authorities there cited. The statute of this country, it is true, has permitted the widow to tarry in the mansion-house and plantation, rent free, until dower is assigned; but as at common law she would have had no right of entry until then, her remaining in the mansion-house should be taken consistent with the statute, and her possession consequently to the limits of the plantation."

A party who is in possession of land without title can have no constructive possession beyond the limits of his actual occupation; and therefore where a man, having possession of the south end of a lot, but without title, cut timber on the north end of the lot, the whole of which he contended was within his constructive possession, it was held that he was liable to the owner in trespass. *Aikin v. Buck*, 1 Wend. 466.

(d.) *Cotenants*. — One of several cotenants cannot maintain an action against the others for trespasses not amounting to an ouster, because all have equal rights of possession and property. *Keay v. Goodwin*, 16 Mass. 1; *Allen v. Carter*, 8 Pick. 175; *Wilkinson v. Haygarth*, 12 Q. B. 837; s. c. 16 Law J. Q. B. 103. If the act amounts to an ouster, an action will lie; as in the case of the destruction of the common property, the *effectual* carrying away of a chattel (*Jacobs v. Seward*, Law R. 5 H. L. 464), and the digging of turf. *Wilkinson v. Haygarth*, *supra*. Otherwise of taking the *vestura terræ* or other

growing profits. *Ib.* The reason why the turf cannot be taken was stated in *Wilkinson v. Haygarth* to be that, if this could be done, the court must also say that a tenant in common could carry all the brick earth from the surface; and it would be impossible to say where he must stop.

In this case the action (for digging and carrying away turf) was brought against the licensee of a cotenant; and one of the pleas was "not possessed." In overruling the plea, Lord Denman said that, if possession in such cases imported exclusive possession, one tenant in common might destroy the subject-matter for his own benefit, and his cotenant be without this remedy. If the plaintiff had joined the cotenant in bringing the action, the latter would have released the defendant, whose act was committed under his orders. The plaintiff, he added, could recover such damages only as were proportionate to his interest in the property; but the wrong-doer had no right to put him to the proof of more than was necessary to show him injured by the wrong done.

The old authorities hold that trespass will not lie between cotenants for any thing short of a destruction of the common property; and this is still the rule in trover, according to the weight of authority. See note on *Conversion*, *post*. "Where two hold the wardship of lands or tenements during the non-age of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of ejectment *de gard* of the moiety, &c., because that these things are chattels real, and may be apportioned and severed, &c., but no action of trespass . . . for that each of them may enter and occupy in common, &c., *per my et per toul*, the

lands and tenements which they hold in common." Littleton, § 323, and commentary thereon, Coke, Litt. 200 *a*; Shepard v. Ryers, 15 Johns. 501.

But this doctrine has been departed from, and it is now held, as was held in the principal case, *Murray v. Hall*, and as was said by Lord Denman in *Wilkinson v. Haygarth*, *supra*, that trespass will lie against a cotenant for an ouster. (*Goodtitle v. Tombs*, 3 Wils. 118, referred to in *Murray v. Hall*, stands upon the ground that a recovery in ejectment, as well between cotenants as in other cases, is conclusive of the right to mesne profits. *Bennet v. Bullock*, 35 Penn. St. 364; *Camp v. Homesley*, 11 Ired. 211; *Carpentier v. Mitchell*, 29 Cal. 330. See the consideration of this point *infra*. Before the St. of 4th Anne, c. 16, § 27, there was no remedy for the profits even through an ejectment. Coke Litt. 199 *b*. That statute gave the remedy by account, where the defendant had taken all of the profits or more than his share of them. *Ib.*, note; *Silloway v. Brown*, 12 Allen, 30, 38.) See also *Silloway v. Brown*, 12 Allen, 30; *Bennett v. Clemence*, 6 Allen, 18; *Marcy v. Marcy*, 6 Met. 360; *Filbert v. Hoff*, 42 Penn. St. 97; *Dubois v. Beaver*, 25 N. Y. 128; *Odiorne v. Ljford*, 9 N. H. 511.

According to Littleton and Coke, as above cited, there was a distinction between chattels real that were severable and chattels real entire. In the latter case there was no remedy by law for an ouster; and it is, therefore, worthy a *quare* whether the doctrine of *Murray v. Hall*, which is placed upon the ground that an ejectment is maintainable, would extend to chattels real which cannot be severed, or to chattels personal, — as to both of which Littleton and his commentator make the rule the same. See

Bennet v. Bullock, 35 Penn. St. 364, 367, where the court suggest that trespass lies only for mesne profits or where there has been a total destruction of the common property.

The court of Vermont, it is to be observed, have expressed the opinion, in accordance with the view of Littledale, J., in *Cubit v. Porter* and the old authorities, that trespass *quare clausum* will not lie between cotenants. *Wait v. Richardson*, 33 Vt. 190. And that was the case of a chattel real which was severable, and had in fact been several; the action being for the cutting and carrying away timber from a lot held in common by the parties. But, as Mr. Freeman suggests (*Cotenancy*, § 299), there is, probably, a distinction between those cases where the severance and carrying away of the chattel real amounts to a practical destruction, or severance of the common property, — that is, where the chattel carried away is the essential part of the common property, — and where the act has no substantial effect upon it. And the carrying away must be effectual, so as to place the chattel beyond the lawful reach or control of the plaintiff. *Jacobs v. Seward*, Law R. 5 H. L. 464, where the defendant carried away hay from an enclosure and put a lock upon the gate, and it was held that this was not a sufficient ouster.

The withholding of possession by one cotenant from his companion is considered as equivalent to an ouster; and an action will lie for this equally with the case of an expulsion. *Silloway v. Brown*, 12 Allen, 30; *Marcy v. Marcy*, 6 Met. 360; *Bigelow v. Jones*, 10 Pick. 161; *Doe v. Prosser*, 1 Cowp. 218; *Jacobs v. Seward*, Law R. 5 H. L. 464; *Clason v. Rankin*, 1 Duer, 337; *Noble v. McFarland*, 51 Ill. 226; *Har-*

risson v. Taylor, 33 Mo. 211; Peterson v. Laik, 24 Mo. 541; Ewald v. Corbett, 32 Cal. 493; Tevis v. Hicks, 38 Cal. 234; Freeman, Cotenancy, §§ 292, 301.

In *Marcy v. Marcy* a cotenant made a conveyance of the premises with warranty to the defendant; and it was urged for the latter, in a writ of entry by the injured tenant, that the conveyance was void as against the plaintiff, and that the grantee, though he had refused, on request, to give up to the plaintiff a moiety of the premises, was not a disseisor, because he had a right under one of the tenants, his grantor. But the court held otherwise, saying that it had been determined upon great authority, and by repeated decisions in Massachusetts, that one cotenant might disseize another. Among other authorities the language of the court in *Doe v. Prosser*, *supra*, was quoted: "The possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him cotenant. Nor, indeed, is a refusal to pay, of itself, sufficient without denying his title. But if, upon demand by the cotenant of his moiety, the other denies to pay, and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough." But a mere denial of the plaintiff's title is not enough if the plaintiff himself be in possession. *Filbert v. Hoff*, 42 Penn. St. 97. The ouster, it is said, must be unequivocal. *Ib.*; *McGill v. Ash*, 7 Barr, 397; *Trauger v. Sassaman*, 14 Penn. St. 514.

As to what constitutes evidence of an ouster, see *Jacobs v. Seward*, Law R. 5

H. L. 464; *Bennett v. Clemence*, 6 Allen, 18; *Keay v. Goodwin*, 16 Mass. 1; *Filbert v. Hoff*, 42 Penn. St. 97; *McGill v. Ash*, 7 Barr, 397; *Harman v. Gartman*, Harper, 430.

The plaintiff is relieved of the necessity of proving an ouster or destruction if the defendant plead that the whole property is his own in severalty or to the exclusion of the alleged right of the plaintiff. *Clayson v. Rankin*, 1 Duer, 337; *Peterson v. Laik*, 24 Mo. 541; *Harrison v. Taylor*, 33 Mo. 211; *Noble v. McFarland*, 51 Ill. 226; *McCallum v. Boswell*, 15 Up. Can. Q. B. 343.

Blackstone (2 Com. 182) fell into a verbal difficulty as to the relations of cotenants to each other by an incorrect apprehension of the French *my* in the designation *per my et per tout* of the manner in which joint tenants hold; as has been pointed out in a note to *Murray v. Hall*, as originally reported in 7 Com. B. 455. The term does not signify "moiety," but is a negative word, meaning "not in the least." See the epitaph on La Fontaine's Picard Wolf, cited in 7 Man. & G. 172, note. "And, therefore, Lord Coke gives the exact force of the expression seized *per my et per tout*, by describing the party so seized as one *qui nihil habet et totum habet*." And the same force is given to the expression by Houard, in *Anciennes Loix des François*, vol. 1, p. 362. The fact is also noticed that Blackstone himself quotes the language of Bracton to the same effect: "*Quilibet totum tenet et nihil tenet; scilicet, totum in communi et nihil separatim per se*."

With respect to occupation and the right to occupy, there is no difference between tenants in common and joint tenants. *Daniel v. Champlin*, 7 Man. & G. 167, 172, note.

(c.) *Mesne Profits*. Entry. — There

is an important qualification to the rule requiring possession at the time of the trespass in order to the maintenance of an action therefor, arising in the case of a suit for mesne profits. That an action is maintainable against a disseizor for the rents due and damages done by him is clear. *Liford's Case*, 11 Coke, 46, 51; *Morgan v. Varick*, 8 Wend. 587; *Leland v. Tousey*, 6 Hill, 328. And the courts, unwilling to admit an exception to the rule, have resorted to the doctrine of relation to support the action in such cases. The disseizee must, however, have obtained possession before bringing his action; and then it is said that the law supposes that there has been no interruption of the plaintiff's seizin. *Ib.* The plaintiff's re-entry operates by relation to give him a possession at the time the trespass was committed, and thereby gives him the necessary footing for his action. *Ib.* And this doctrine operates as well against the servants of the defendant as against the defendant himself. *Ib.*

There has been considerable doubt whether an action for mesne profits can be maintained against one whom the law has called a stranger; that is, one who claims by descent or purchase from the disseizor. And this doubt arose from an unsettled state of the early law. Upon this point there is a well-known *dictum* of Lord Coke in *Liford's Case*, *supra*. "If one disseizes me," said he, "and during the disseizin he cuts down the trees or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him *vi et armis* for the trees, grass, corn, &c.; for after my regress the law as to the disseizor and his servants supposes the freehold always continued in me.

But if my disseizor make a feoffment in fee, gift in tail, lease for life, years, &c., and afterwards I re-enter, I shall not have trespass *vi et armis* against those who came in by title; for this fiction of the law, that the freehold continued always in me, shall not have relation to make him who comes in by title a wrong-doer *vi et armis*, for in *fictione juris semper equitas existat*." And again, "If my disseizor is disseized, I shall not have an action against the second disseizor, and I shall recover all my mesne profits against my disseizor."

This *dictum* of Lord Coke, though much criticised, has often been referred to as good law; by Parke, B., in *Barnett v. Guildford*, 11 Ex. 19, 30, and by the courts of New York in *Case v. De Góes*, 3 Caines, 261, 263, in *Van Brunt v. Schenck*, 11 Johns. 377, 385, and in *Dewey v. Osborn*, 4 Cowen, 329, 338. But in these cases the reference to *Liford's Case* was extra-judicial.

In *Barnett v. Guildford*, the question before the court was of the right of the customary heir of a copyholder to maintain an action for mesne profits, accruing after the descent but before entry, against the lord of the manor, who had wrongfully withheld possession; and it was decided that the entry of the heir operated by relation, and the action was upheld. Mr. Baron Parke found it necessary to overrule an opinion expressed by him in *Litchfield v. Ready*, 5 Ex. 939, to the effect that the doctrine of relation was confined to cases of disseizin; but added, by way of caution, that in cases of disseizin the doctrine did not extend to strangers.

In *Case v. De Góes* the defendant justified under a license from one who had been put into possession under a writ of restitution; which writ was afterwards quashed. It was not, there-

fore, a case of an originally wrongful possession; though the court state that the licensor could be held as a trespasser by relation. See *Cummings v. Noyes*, 10 Mass. 483; *Munroe v. Luke*, 1 Met. 459, 468.

Van Brunt v. Schenck was a similar case. A vessel had been seized by a custom-house officer for violation of the revenue laws; and while the vessel was under seizure the defendant, a surveyor of the port, and interested with the other officers of custom in seizures, made use of the same by consent of the party who had caused the seizure. The defendant had not been concerned in the seizure. The vessel was finally acquitted, and trespass was brought by the owner against the surveyor. It was held that the defendant could not be considered a trespasser by relation, and that the plaintiff had not, after seizure, such possession of the vessel, or right to reduce it to his possession, as was essential to the maintenance of the action. It is to be observed of this case, however, that the question arose concerning personal property; and there was a dissenting opinion based upon this fact. It was said that in the case of trespasses on real property, the gist of the action is the injury to the possession; while for an injury done to personal property the party who has the general property may, if entitled to immediate possession, have an action of trespass although he has not the actual possession. And it was said that when the seizing officer gave the vessel into the possession of the defendant, the right to resume possession at once arose in the plaintiff. See this point considered in the note on Conversion, *post*. See also, as to *Van Brunt v. Schenck*, the criticism in *Story, Agency*, § 311, note.

The question in *Dewey v. Osborn* was simply whether a plaintiff in ejectment might bring trespass against the defendant or his servants for injuries committed between the time of the verdict and the *habere facias possessionem*; and it was held that he could.

The point was again adverted to in *Bacon v. Sheppard*, 6 Halst. 197, but was left without expression of opinion. That case involved the question of the right of action against a stranger coming in under one who had been put into possession by virtue of a writ of *hab. fac. pos.*, which had been subsequently set aside. The case was therefore like *Case v. De Goes*; and following that decision and *Morril's Case*, 13 Coke, 21, it was held that the action could not be maintained. But it was said that the case would have been otherwise against the party under whom the defendant claimed.

In all of these cases the defendant claimed under one who had been lawfully let into possession; and there seems good reason why in such cases the defendant should not be liable for mesne profits, since one who has obtained possession by process of law may well be presumed by third persons to be rightfully possessed while the process, with the possession under it, continues in force. See *Bacon v. Sheppard*, 6 Halst. 197, 200.

It would seem that purchasers, third parties, under judicial sales, would be strangers within this rule; since, though they do not acquire title from parties let into possession under legal process, they take through the sheriff, who may be reasonably presumed to be acting lawfully. And so it has been decided. *Dabney v. Manning*, 8 Ohio, 321. Indeed, if purchasers at judicial sales were required to know that the judgment was not erroneous and liable to be set aside,

it would be a barrier in most cases to all such proceedings. But if the party who instituted the erroneous proceedings should become the purchaser, it would seem by analogy to the cases of plaintiffs in ejectment who have been put into possession under process which has afterwards been set aside (of which several of the above cases are examples) that he would be liable in trespass for the mesne profits.

In *Sanderson v. Price*, 1 Zab. 637, however, there was a dissenting opinion of four against six of the New Jersey Court of Errors against thus restricting the right of action. In that case the dissenting members of the court thought that, upon recovering possession in ejectment by a mortgagee against a tenant of the mortgagor (under a lease executed after the mortgage), the mortgagee could recover mesne profits from the tenant from the time of the service in ejectment. This doctrine has been upheld by the Court of Vermont. In that State it is decided that the mortgagee is entitled to recover the rents and profits against an assignee of the mortgagor from the time of notice to quit by the plaintiff, or, in the absence of such notice, from the commencement of the action of ejectment. *Babcock v. Kennedy*, 1 Vt. 457; *Lyman v. Mower*, 6 Vt. 345. And this seems to be the general common-law doctrine. See Taylor, Land. and Ten. § 121, and notes.

According to the law of Massachusetts, the mortgagee cannot recover mesne profits from the mortgagor accruing before actual entry; and therefore he cannot recover them from his assignee. *Wilder v. Houghton*, 1 Pick. 89. See *Boston Bank v. Reed*, 8 Pick. 459; *Mead v. Orrery*, 3 Atk. 244; *Higgins v. York Buildings Co.*, 2 Atk. 107.

Where, however, the mortgagee can recover against his mortgagor by relation, it would seem that the doctrine of the minority in *Sanderson v. Price* was correct; for the mortgagor's tenant or assignee, against whom the ejectment is brought, can in no sense be considered a stranger.

These cases, therefore, do not touch the doctrine of Lord Coke's *dictum*; though it is to be observed that in the dissenting opinion in *Sanderson v. Price* that doctrine was denied.

The *dictum* in *Liford's Case* is opposed to *Holcomb v. Rawlins*, 2 Croke Eliz. 540; but this case was decided some twenty years earlier. It was an action of trespass *quare clausum*; to which the defendant pleaded that, long before, Thomas Clerk was seized in fee, and had let to him for years. The plaintiff replied that he himself was seized until disseized by Clerk, and that after the lease to the defendant he re-entered; to which the defendant demurred. The demurrer was overruled; *Popham, Gawdy, and Fenner, JJ.*, saying, "By the re-entry of the disseizee he is remitted to his first possession, as if he had never been out of possession. And then all who occupied in the mean time, by what title soever they came in, shall answer unto him for their time; as if a disseizor had been disseized by another, [and] the first disseizee re-enters, he shall in trespass punish the last disseizor." *Clench, J.*, dissented.

There is also a modern case opposed to Lord Coke's *dictum*. *Morgan v. Varick*, 8 Wend. 587. This was an action of trespass for mesne profits and for goods carried away. The plaintiff had recovered in ejectment against the defendant as a disseizor, and now, besides demanding mesne profits, claimed

the right to recover for machinery and boilers severed from the freehold by the defendant and sold to another who had, at the defendant's request, carried the same away. It was contended that the purchaser became the owner of the property, and had the right to remove it with the consent of the defendant, and that, being a purchaser, he could not be a trespasser; and, if he was not a trespasser, the defendant did not become a trespasser by requesting the removal. That is, according to Lord Coke, the defendant's vendee could not be a trespasser; and the defendant could not be a trespasser for severing and requesting the removal of the goods which belonged to the vendee. But this reasoning was held unsound. The court, however, were careful to say that the case had no connection with the class of cases (above presented) where the party in possession had acquired possession lawfully; but referring to the *dictum* of Lord Coke, as cited by the New York judges in the above cases, it was said, "If that be law, an irresponsible person may turn the owner forcibly out of possession of his real estate, sell the buildings and the timber, and thereby destroy the value of the property; he may sell it, too, under ever so suspicious circumstances, as in this case, for less than one-quarter of its value, and, according to the doctrine quoted, the purchaser is safe, and the owner has no remedy but against the trespasser. Fortunately for the owners of real estate, such is not now the law, whatever it might have been in the time of Lord Coke." Again: "The disseizor, being in possession by wrong, has no legal right to the possession, nor to any thing belonging to the inheritance. Having no title, he can convey none. If, under such circumstances, the disseizor sells

timber or buildings, or any thing attached to the freehold, the severance of such property is a trespass, and the article when severed becomes the personal property of the disseizee, the owner of the inheritance. . . . No title having passed out of the plaintiff, all who were concerned in the removal were trespassers. The defendant, Varick, by requesting Leavenworth to remove the property, became a party to the trespass, and is liable to this action."

The *dictum* of Lord Coke was probably founded in part on the common-law doctrine of the peculiar tortious operation of a disseizin. So important was the fact of seizin held that if the disseizee failed to enter before the disseizor deceased, his right of entry was lost, and he was driven to prove his title at law. Coke Litt. 238 a; 3 Washb. Real Prop. 120. This rule had, however, been so far changed by St. 32 Henry 8, c. 33, that no descent cast would bar the right of entry unless the ancestor should have been in possession for five years after the disseizin. Coke Litt. *ut supra*. So, too, if one should wrongfully enter as tenant in tail and make a feoffment, or at least if a tenant in tail should make a wrongful feoffment, this operated in Coke's time to bar the reversioner or remainder-man (as well as the heir in tail) of his right of entry: Coke Litt. 327 b; and, the right of entry being gone, he could not enter without being himself guilty of trespass, though the title had accrued in possession (by the death of tenant in tail without issue); which shows that the party in possession had what the law termed the *jus possessionis*. It follows that in these cases trespass could not be maintained; and as these were the cases that would most frequently arise, the *dictum*

of Lord Coke was generally beyond dispute correct.

In other cases which might have arisen, as where the disseizor enfeoffed another for *life*, the right of entry of the disseizee was not lost; and if the rule in *Liford's Case* still held good, it can only be explained on the ground that it was not a trespass to receive a feoffment from the disseizor.

But this doctrine of the operation of a disseizin has been abolished by statute in England. See 1 Stephens, Com. 510 (7th ed.). And it is said that the effect of a descent cast in tolling the entry of the disseizee does not prevail in this country. 3 Washb. Real Prop. 120. But this, it seems, is not true in Massachusetts. See *Emerson v. Thompson*, 2 Pick. 473. In this case it was decided that the St. of 32 Hen. 8, c. 33, above referred to, was in force in Massachusetts, so that the disseizee's right of entry was not tolled unless the disseizor had had five years peaceable possession before his death; but it was conceded that after five years the right of entry would be lost.

This case of *Emerson v. Thompson* was trespass against the heirs of a disseizor (who had not held peaceably for five years) for mesne profits from the time of the descent, or at least from the time of the issuance of a writ of entry, until judgment of possession and actual entry thereunder, a period of nearly two years. Judgment was given for the profits accruing from the date of the writ; thus establishing a relation from the actual entry. The defendants had entered only the day before the writ of entry was issued, and (the point being of such slight importance) it was left undecided whether

the right of action related to the time of their entry.

The case therefore did not touch the doctrine of the *dictum* in *Liford's Case*, though the majority of the court seem to have thought that rule rather harsh, and not to be extended. The ground of the decision in favor of the relation was, that the proceedings under the writ of entry were regarded as equivalent to those in the action of ejectment, except that in the former the right of possession was not in issue (*Cox v. Callender*, 9 Mass. 533), which right had been established in the present action for mesne profits; and as judgment in ejectment was conclusive of the right to the profits from the commencement of the action, the same would be true under the evidence of the present case. This was, however, strongly controverted in a dissenting opinion by Putnam, J.

All of the old authorities bearing upon the *dictum* of Coke are incidentally considered in this case. Among those which sustain the *dictum* are the following: *Symons v. Symons*, Hetley, 66; Bro. Abr. Trespass, pl. 35; Bac. Abr. Trespass, G. 2; and several cases from the Year-Books. In *Gilbert, Tenures*, 50, it is said that the old law was in conformity with the opinion of Lord Coke; and he assigns as a reason why the feoffee's title was formerly allowed, though he came in by wrong, or colorable title, that the feoffee anciently paid a fine to the lord.¹ The law as declared in *Holcomb v. Rawlyns*, *supra*, is, on the other hand, thought correct in 2 Rol. Abr. 554, Trespass by Relation; *Gilbert, Tenures*, 47, 50; *Comyns's Dig. Trespass*, B. 2; *Buller, N. P.* 87.

The doctrine of Lord Coke is again

¹ In very early times the right of entry was gone in *all* cases of feoffment by the disseizor, after a year and a day. Coke Litt. 238 a.

cited with approval in *Stanley v. Gaylord*, 1 Cush. 536, 557, by the same learned judge who delivered the opinion of the court in *Emerson v. Thompson*; and though this was in a dissenting opinion, it was upon a point not controverted by the majority.

And it may still be a question in those States in which the common-law doctrine of the bar of entry by descent cast has not been adopted, whether an action for mesne profits can be maintained against the heir or alienee of a disseizor; in other words, whether the fiction of relation by entry should be extended to such cases. It is difficult to see how such a party can be regarded as a trespasser, even by the use of the fiction. The proper function of the relation is simply to give the plaintiff the requisite possession at the time of the trespass, and not to change the character of the defendant's act. There must have been a trespass; and unless the acquisition of title from a disseizor can be regarded as a trespass, the defendant cannot be liable.

The case is unlike that of personal property conveyed by one having no title or authority, for such purchaser acquires no interest and may well be held a trespasser for refusing to surrender it to the owner; but a disseizor has an actual estate,—an estate which may become indefeasible by the lapse of time.

But though at common law the alienee of a disseizor could not, as the weight of authority inclines, be held liable in trespass for mesne profits, it did not follow that the title to the profits, not consumed by him, were in him; and the contrary was decided in *Liford's Case*. "If the feoffee or lessee," said the court, "or the second disseizor sows the land, or cuts down trees or grass,

and severs and carries away, or sells them to another, yet after the regress of the disseizee, he may take as well the corn as the trees and grass, to what place soever they are carried; for the regress of the disseizee has relation as to the property, to continue the freehold against them all in the disseizee *ab initio*, and the carrying them out cannot alter the property. And if the disseizee takes them, they shall be recouped in damages against the disseizor."

Though the law favors the owner of lands who has been dispossessed of them to such an extent as to give him a right of action for mesne profits by relation against the party who originally entered, he must have actually entered or have become placed in a situation equivalent to an entry. In *Allen v. Thayer*, 17 Mass. 299, the plaintiff sought to recover mesne profits of the defendant, who had originally been a tenant of the plaintiff. While the defendant was in this situation, certain creditors of the plaintiff levied upon the land and had it appraised and set off to them. The defendant was expelled, but was permitted to re-enter as tenant of the creditors, and finally purchased the reversion of them in fee. Afterwards it was discovered that the deed to the creditors was defective and void; and thereupon other creditors of the plaintiff levied upon the premises, and held it against the first creditors and the defendant. The plaintiff supposed the defendant liable to him for the mesne profits between the two levies, either in *assumpsit* for the use and occupation or in trespass; but the court held the contrary. The ground of decision was that the defendant was not liable in *assumpsit* because after the first levy he no longer held of the plaintiff; and the defect in the title did

not restore him to privity with the plaintiff. And he could not maintain trespass, because he had been disseized, and had never re-entered, though he might have done so. The effect of the decision is, that such a party must enter himself, and can take no benefit from the levy and entry of another, who acts upon the invalidity of the original dispossession and conveyance. So, too, a judgment against the tenant in a writ of entry brought in the name of several coheirs, at their joint expense, to try the title, will not enure to the benefit of another of those coheirs in an action of trespass for mesne profits. *Allen v. Carter*, 8 Pick. 175.

But it is held that a regular and complete levy under an execution will give such a possession as will be sufficient to maintain trespass without an actual entry by the creditor. *Langdon v. Potter*, 3 Mass. 215; *Gore v. Brazier*, ib. 528; *Munroe v. Luke*, 1 Met. 459, 462.

Langdon v. Potter was an action of trespass *quare clausum*. It did not appear that the plaintiff had any other possession of the close, or right to the issues and profits, than such as he derived from a due levy against the defendant, and a proper return and register of the execution. The defendant, the execution debtor, had continued in the actual possession ever since the levy; and it was accordingly argued for the defendant, upon the supposed analogy of the extent of an *elegit*, that the plaintiff could not maintain trespass. But the objection was overruled.

The opinion of the court in this case is both interesting and important for the purposes of this note, and we quote at length from it. "The objection to the sufficiency of the plaintiff's evi-

dence," said Parsons, C. J., speaking for the court, "is founded on the position that the levy of the execution and its return and registry do not amount to an actual livery of seizin and of possession, to enable the plaintiff to maintain trespass against the defendant Potter for continuing his possession; but that the plaintiff, after the levy, ought to have made an actual entry before he commenced his suit. And this position is supposed to be justified by the principles of the common law which apply to the extent of an *elegit* on a moiety of the debtor's lands. For the sheriff returns on the *elegit* that he had delivered a moiety of the lands to the plaintiff, which delivery does not give the plaintiff the actual possession, but only a right of entry and of possession. In the levy of an execution on lands two things are to be considered,—the authority of the sheriff, and the rights of the plaintiff resulting from the legal exercise of that authority. In the case of an *elegit*, the plaintiff's right under the extent is correctly stated in the objection; and this right results from the authority of the sheriff, and from the manner in which it is exercised. It is the sheriff's duty to impanel a jury, who, on oath, inquire what freehold lands the defendant holds within his bailiwick, and fix the yearly value of them. When the jury have ascertained the lands, and appraised their yearly value, the sheriff delivers just one moiety, according to that appraisement, to the plaintiff, to hold until out of the annual profits, as valued by the jury, he receive his debt and interest. The inquisition is then returned and entered of record in the court whence the *elegit* issued. If the sheriff had in fact put the defendant out of, and the plaintiff in, possession under the inquisition, which

seems anciently to have been the practice, it was supposed that the defendant had no remedy, if the sheriff's proceedings were irregular, but by moving to set aside the inquisition, because the plaintiff was in possession by a title on record. The rule was therefore established that the delivery by the sheriff of the lands to the plaintiff was a complete execution of his authority, without dispossessing the defendant; and that the plaintiff's right was a *right of entry and of possession*. The plaintiff, having this right, might bring an *ejectione firmæ*, and eject the defendant; or he might enter peaceably and retain the possession without being considered as a wrong-doer. . . . Let us now advert to our statutes making real estate liable to pay debts, and providing for the taking of it in execution [which statutes are probably the same in substance as those that prevail in other States]. The execution may be levied on all the freehold estate of the defendant, and in one case on the rents and profits. When the execution is levied on real estate, all the defendant's title to and interest in the estate is transferred to and becomes the property of the plaintiff, at a reasonable appraisement of the value. In levying the execution, the sheriff proceeds without the intervention of a jury. The plaintiff shows him certain lands as the estate of the defendant, and directs the sheriff to satisfy the execution by a levy on those lands. Three freeholders are then selected, one by the plaintiff and two by the sheriff, if the defendant neglect to choose one, which he may do. These freeholders on oath appraise the land, or so much thereof as is equal in value to the execution and the charges of levying, describing by metes and bounds the lands thus appraised. The officer

is then expressly directed to deliver possession and seizin of the appraised lands to the creditor. It is also provided that the execution, when returned and registered, pursuant to the statute, shall make as good a title to such creditor, his heirs and assigns, as the debtor had therein. The creditor, therefore, is the purchaser of the estate for the full value, according to the appraisement of it by disinterested freeholders; he has the possession and seizin of it, and his title is as good as the debtor had. Although there may be a concurrent *possession*, there cannot be a concurrent *seizin* of lands [except in cases of disseizin by election. See *Slater v. Rawson*, 6 Met. 439, 444]; and, as livery of seizin is made to the plaintiff, the defendant can no longer continue seized, and he [the plaintiff] only being seized, the possession must be adjudged to be in him because he has the right [see per Maule, J., in *Jones v. Chapman*, 2 Ex. 803; *supra*, p. 352]; and, having the actual and rightful possession, he is immediately entitled to the profits against the defendant. If the defendant shall, notwithstanding, continue his former possession, it will be an injury to the possession of the plaintiff, who may maintain trespass for that injury. This conclusion results from construing the statute according to the natural import of the words. But justice to the plaintiff requires this construction. He has purchased and paid for the land in the state in which it was in, with all the crops growing at the time of the appraisement; and his execution is satisfied. To consider him, therefore, as not actually seized, and entitled to receive the profits by force of the levy, but driven to an action if the defendant choose to resist his entry, will be to

deprive him of the profits for which he has paid, and to permit the defendant to receive them ; and for this injury the plaintiff must be remediless, or seek a remedy by a suit at law to recover damages." That is, if the defendant should resist the plaintiff's entry, the plaintiff would be driven to two actions by the position taken by the defendant's counsel ; one to obtain possession and another to recover for the mesne profits. (But now by statute in Massachusetts the demandant in a real action recovers for the rents and profits in the same suit ; and a subsequent action for them cannot be maintained. *Raymond v. Andrews*, 6 Cush. 265. See also *Richards v. Randall*, 4 Gray, 53 ; *Judd v. Gibbs*, 8 Gray, 435. So it is in New York. *Jackson v. Leonard*, 6 Wend. 534 ; *Broughton v. Wellington*, 10 Wend. 566 ; *Leland v. Tousey*, 6 Hill, 328. And this, it is believed, is now generally the case in this country. If, however, possession be regained without suit, an action may then be maintained for the mesne profits and for the wrongful entry. *Leland v. Tousey*, *supra*. But possession is still necessary. *Ib.* In this case, Cowen, J., said that the statute which took away the right of a separate action for mesne profits was to be understood of mesne profits strictly, the right to which results from a recovery in ejectment. The original entry is still the subject of an action of trespass ; and so are mesne profits where the plaintiff obtains possession without suit. The statute, moreover, was to be restricted to cases where the claim for mesne profits was against the same person or persons who were made defendants in the ejectment ; such as would be concluded by the judgment in that action.)

See also in this connection *Poole v.*

Mitchell, 1 Hill (S. Car.), 404. There the plaintiff had purchased property at sheriff's sale, and, as an act of kindness, had permitted it to remain in the possession of the debtor. It was afterwards levied upon in execution against the debtor by a subsequent creditor who had notice of the plaintiff's title ; and for this act the plaintiff brought trespass, and recovered.

Nor is an actual entry necessary by the grantee of one in possession so as to enable him to maintain an action for trespass committed by a person who had been upon the land by license of the grantor, and had remained after the license had expired and the plaintiff had purchased. *Reed v. Merrifield*, 10 Met. 155. In this case one Chamberlain conveyed to the assignor of the defendant all the timber on his land, the assignor "to have five years to get off the timber, and to have no right to the wood which might arise from cutting the timber." Chamberlain afterwards conveyed the land to the plaintiff's father, "excepting a lease of all the timber thereon given," as above stated. The grantee conveyed to the plaintiff, who had not made an entry. It was contended, in trespass for entering and carrying away timber after the lapse of the five years, that the (so-called) lease of Chamberlain conveyed an interest in the land, and that, after its expiration, he became tenant at sufferance, and that the action therefore would not lie ; but the court ruled otherwise. The instrument, it was held, was not a grant of any interest in the land so as to give to the defendant any exclusive possession. The learned judge observed that a mistake was sometimes made by not distinguishing between a right to enter on land for specified purposes, under a license or contract, and a right of pos-

session by a lessee, to the exclusion of the owner in fee. The first is not only consistent with the possession of the owner, but does not alter or affect it. The latter is a grant of the possession, which cannot be resumed without entry. The plaintiff was in possession by force of his deed, and there was no necessity of an entry by him to terminate any right on the part of the defendant. And the defendant was not a tenant at sufferance. (That an entry is necessary before a tenant at sufferance can be liable in trespass, see *Rising v. Stannard*, 17 Mass. 282; *Mayo v. Fletcher*, 14 Pick. 525, 532).

(f.) *Injuries to Personalty*. — The cases and principles discussed in the foregoing pages are sufficient to illustrate the doctrine of possession in actions for injuries committed upon lands. For a consideration of questions of possession in actions concerning personalty the learned reader is referred to the note on Conversion, *post*. The difference between an action for conversion and an action merely for trespass concerns mainly the nature of the act, and not the matter of possession; the rule which generally prevails being that trespass to goods cannot be maintained where the taking was lawful, on the ground that in such an action the jury might give damages for the mere taking, aside from the value of the goods. *Balme v. Hutton*, 9 Bing. 471; *Smith v. Milles*, 1 T. R. 480; *Wilson v. Barker*, 4 Barn. & Ad. 614; *Cooper v. Chitty*, 1 Burr. 20; *Barrett v. War-*

ren, 3 Hill, 348. See, however, *Stanley v. Gaylord*, 1 Cush. 536. But it is clear that trover may be maintained though the taking was lawful, if there was afterwards a conversion. *Ib*. Where, then, there was a tortious taking, the possession which will be sufficient for trover will doubtless be sufficient for trespass.

The distinction between real and personal property in respect of questions of possession, it may be observed, is that in the case of personalty the property draws to it the possession, so that there can be no adverse possession of a chattel which shall defeat the right of action in trespass; and it is not necessary, therefore, that the owner should regain the actual possession before he can maintain the action. Thus, if A. in London gives J. S. his goods at York, and another takes them away before J. S. obtains actual possession, J. S. may maintain trespass for them. *Bac. Abr. Trespass, C, 2*. But if the goods be taken from one to whom the plaintiff had leased them, the principle does not apply; for the rule simply means that the property draws to it the possession when the owner has the right to possession. If, then, the property be taken from one who has merely a gratuitous custody, the owner having still the right of possession, it is held that he may maintain trespass against the taker. *Walcot v. Pomeroy*, 2 Pick. 121, where an attaching officer and the creditor were held liable under such circumstances.

WILLIAMS v. ESLING.

(4 Barr, 486. Supreme Court, Pennsylvania, 1846.)

Entry upon Land. Damage. An action lies for a trespass upon a right of way without proof of actual damage.

TRESPASS on the case for obstructing a right of way over a court. The judge charged the jury that the plaintiff must show some actual hindrance or obstruction to his passage; and that a mere deposit of articles in the court, if removed before causing any obstruction to the plaintiff, would not give a cause of action.

J. W. Biddle, for plaintiff in error. *McIlvaine*, contra.

GIBSON, C. J. An action was maintained in *Kirkham v. Sharp*, 1 Whart. Rep. 333, by the grantee of a private way, against the owner of the soil, standing in the place of the grantor; and avowedly without proof of special damage, or actual obstruction in any particular instance. The necessity of such proof was not even alleged. The difference between that case and this is, that the action here is not, as it was there, against the owner of the soil, but against an intruder without any pretence of title whatever, a difference that will scarce be thought to be unfavorable to the present plaintiff. The English courts seem to have wavered as to the application of the principle to analogous cases; but the only thing like a conflicting authority in the case of a way is the *dictum* in *Woolrych on Ways*, p. 283, that it is usual for the plaintiff to prove some damage from an obstruction of a private way, though to the smallest amount, merely to satisfy the jury that he has been unable, in consequence of the defendant's conduct, to use his right in so ample and beneficial a manner as he had been accustomed to do. But it is not said that proof of special damage is indispensable, or that it is the basis of the action. The case cited for the *dictum* is *Pindal v. Wadsworth*, 2 East, 154, which, however, is the case of an action, not for obstructing a private way, but for injuring a common by taking away the manure dropped on it by the cattle; and the court certainly did say, that if the commoner who sued for it was not injured by it, he would not have a right to reparation; but it was also said, that the act was a necessary

and an immediate damage. In no English case has there been raised a question about the necessity of special damage in an action like the present ; but analogies from actions for surcharging a common bear strongly upon it. *Hobson v. Todd*, 4 Term Rep. 71, was such an action ; and Mr. Justice Buller said that the plaintiff was entitled to recover without proof of specific damage. That was one ground of his opinion ; “but there is another ground,” said he, “on which the action may be supported, which is, that the right has been injured.” The solution of the difficulty is in that one word. In *Pastorius v. Fisher*, 1 Rawle, 27, it was said that the law implies damage from the violation of every right ; but that, without proof of actual detriment, it implies the smallest appreciable quantity. Now, the grant of a way is exclusive, at least as to strangers ; and that every intrusion into the enjoyment of an exclusive right subjects the wrongful participant to an action by the owner of it, was directly adjudged in the case of the dippers at Tunbridge Wells (*Weller v. Baker*, 2 Wils. Rep. 422), who recovered on an action against one who had usurped the office of a dipper, not having been duly chosen at the court baron. The court held that the very act of intrusion was both an injury and a damage, — an injury, by disturbing the plaintiffs in the exercise of their right ; and a damage, in depriving them of gratuities which they might have received ; and it was held that an action on the case lies for merely a possibility of damage. Yet the dippers were not more impeded in their functions by the intrusion there, than was the plaintiff in the actual use of the alley by the intrusion here ; for they were left to get all they could earn, and it was not certain they would have earned a farthing of what the intruder got. But their exclusive right was violated, and a possibility of detriment from it was held to be a subject of compensation. In *Hobson v. Todd*, Mr. Justice Buller applied the same principle to an action by a commoner, saying that had it not been for the surcharge, the plaintiff’s cattle might have eaten every blade of grass that had been eaten by the supernumerary cattle of the defendant. Such a plaintiff might undoubtedly recover without proof that the surcharge had occasioned a scarcity ; and why not the plaintiff before us, without proof that ground enough had not been left for the convenient enjoyment of his right ? There is an error in forgetting that he is entitled to the exclusive use

of the whole of it, which would equally justify any usurpation of a man's right of property that left him enough for a comfortable subsistence. The very breaking in upon the defendant's privacy was a damage ; and if the plaintiff could not sue for it because the extent of it was inappreciable, the defendants might establish a right of participation in the use, by acts of intrusion repeated for twenty years, just as a wrong-doer, it was said by Mr. Justice Buller, in *Hobson v. Todd*, and by Mr. Justice Grose, in *Pindar v. Wadsworth*, might establish a right of common, because the cattle of the commoners had been left enough of grass to keep them from starving. With much more force is that principle applicable to the case before us. The legal title to the soil is in the common-law heir of the purchaser of it, who annexed the use of it to the Chestnut Street lots, with which he subsequently parted ; and as he has no beneficial interest involved in it, or motive to burden himself with a lawsuit, for a trespass on it, the defendants would certainly gain a concurrent right to the easement by adverse user of it, if no one else could sue for any thing short of an actual hindrance in the enjoyment of it. Who would contest the matter with them ? The plaintiff would scarce bring a separate action for each obstruction, or sue for damage to the amount of a few cents, for the detention of his carriage or his cart for a few minutes ; for though these petty annoyances are exceedingly irksome in the aggregate, not one of them, singly, would be worth the trouble of a lawsuit. He might as well give up his right at once, as attempt to maintain it by repeated actions for repeated hindrances. But the measure of damages is not the extent of each particular loss. The right being established, a jury is at liberty to enforce it, by making the offender smart for any further violation of it. When the plaintiff showed that impediments were placed in the alley which might have prevented him from attempting to use it, he showed enough to entitle him to a remedy without proof of an attempt actually frustrated ; and an intruder can ask no more.

Judgment reversed, and venire de novo awarded.

ANTHONY v. HANEY and HARDING.

(8 Bing. 187. Common Pleas, England, Hilary Term, 1832.)

Trespass quare clausum fregit. Trespass for entering plaintiff's close. Plea, that certain goods of defendants' were there, and that they entered to take them, doing no unnecessary damage. *Held*, ill.

TRESPASS. The declaration stated that defendants, on the 8th of November, 1830, and on divers other days, &c., between that day and the commencement of the suit, broke and entered plaintiff's close at Much Haddon, in the county of Hertford; and with feet in walking trod down, trampled upon, and consumed and spoiled plaintiff's grass, and with cattle and wheels of divers carts, &c., crushed, damaged, and spoiled other grass; and with the feet of the cattle and the wheels of the carts subverted, &c., the earth and soil of the close, and then and there put, placed, and laid down divers quantities, to wit, 5,000 bricks, &c., in and upon the said close, and kept and continued the same without leave or license and against the will of the plaintiff, and thereby greatly encumbered the close, and pulled down, prostrated, and destroyed one barn, three out-houses, and three leantos of plaintiff, and in so doing dug up and subverted the earth, and made divers holes therein, and seized, took, and carried away the materials of the said barn, out-houses, and leantos.

There was a second count, for seizing, taking, and carrying away a cart and divers goods and chattels of plaintiff; and a third count, for breaking and entering a certain other barn, out-houses, and leantos of plaintiff, &c.

Plea, first, the general issue, on which issue was joined; second, that before and at the said time when, &c., in the said first count mentioned, the defendant, John Haney, was the owner of and entitled unto a certain barn, three out-houses, and three leantos, and divers goods and chattels, to wit, 10,000 bricks, 10,000 tiles, 5,000 planks of wood, 5,000 joists, 5,000 ties, 5,000 girders, 5,000 pieces of wood, 5,000 loads of timber, and 1,000 weight of iron, of great value, to wit, of the value of 200*l.*, then respectively standing and being in and upon the said close of the said plaintiff, in which, &c.; wherefore the said defendant, John Haney, in his own right, and James Haney and Joseph Harding,

as the servants of the said John Haney, by his command, at the said several times when, &c., in the said first count mentioned, entered into and upon the said close in which, &c., in order to pull down, remove, take, and carry away the said barn, out-houses, and leantos, and to take and carry away the said goods and chattels, and did then and there pull down the said barn, out-houses, and leantos, and did take and carry away the materials thereof, and the said goods and chattels, in the said carts, wagons, and other carriages drawn by the said cattle, from and out of the said close in which, &c., and in so doing, they, the said defendants, at the said several times when, &c., in the said first count mentioned, did necessarily and unavoidably, with their feet in walking, a little tread down, trample upon, consume, and spoil a little of the grass there then growing and being, and did, with the wheels of the said carts, wagons, and other carriages, a little crush, damage, and spoil the said grass there also growing, and with the feet of the said cattle, and with the wheels of the said carts, wagons, and other carriages, did a little subvert, damage, and spoil the earth and soil of the said close, and did necessarily and unavoidably put, place, and lay in and upon the said close in which, &c., the said bricks, tiles, wood, and rubbish in the said first count mentioned, being part of the materials of the said barn, out-houses, and leantos, and there keep and continue the same for a short time, to wit, until the same could be put in the said carts, wagons, and other carriages to be removed from the said close, doing no unnecessary damage to the said plaintiff on the occasions aforesaid, as they lawfully might for the cause aforesaid, which are the said several supposed trespasses in the introductory part of this plea mentioned. Demurrer and joinder.

Stephen, Serjt., for the demurrer, was not called. *Bompas*, Serjt., supported the plea.

TINDAL, C. J. The second plea in this case cannot be supported in law; and it is bad on a ground much short of that which has been argued to-day. The defendant Haney states, as the ground of his right for entering the plaintiff's close, that he was the owner of a certain barn, three out-houses, three leantos, and certain chattels standing and being on the plaintiff's close, and then goes on to justify the trespass in question. I cannot collect from this statement but that the barn, leantos, &c., were standing on the close in the ordinary acceptation of the term, that is, were affixed to the freehold; and the rather, because the

defendant admits that he dug up the soil of the plaintiff in order to remove the barn; in other words, that he entered the soil of another and broke it up to get what he claimed as his own. That would be to take the law into his own hands, and to render an action of ejectment unnecessary. If so, the plea, which is bad in part, is, under the common rule, bad for the whole, and judgment must be given for the plaintiff. But we are unwilling to decide the case on so narrow a ground; for even if the barn had not been affixed to the freehold, the defendant has shown on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shown the circumstances under which his property was placed on the soil of another. Here the defendant has confined himself to the statement that they were there, without attempting to show how. To allow such a statement to be a justification for entering the soil of another would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace. Let us examine two or three of the cases which have been cited on the part of the defendant. And first, that of fruit falling into the ground of another; that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter. So in the case of a tree which is blown down, or through decay falls into the ground of a neighbor, the owner may enter and take it. But the distinction is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken, and the owner pursues to obtain possession, the principle is laid down by Blackstone, 3 Comm. 4, who says: "As the public peace is a superior consideration to any one man's private property, and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or

entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law." A case has been suggested in which the owner might have no remedy, where the occupier of the soil might refuse to deliver up the property, or to make any answer to the owners' demand; but a jury might be induced to presume a conversion from such silence, or, at any rate, the owner might in such a case enter and take his property, subject to the payment of any damage he might commit.

PARKE, J. I am of the same opinion. The distinction is clearly laid down by Blackstone in the case of goods feloniously taken, who says, "If my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law." Upon these pleas it rather appears that the property claimed by the defendant was attached to the freehold, than that it was a chattel in the nature of a Dutch barn; for it is admitted that he dug holes in order to remove it. The defendant is not, as it has been contended, without remedy; for he might sue in trover after a proper demand, and if his application were met with continued silence, the jury might from that presume a conversion.

BOSANQUET, J. I am of opinion that this plea is no answer to the trespass with which the defendant is charged. It is put broadly and nakedly that the defendant has a right to enter the soil of another to take his own property, without showing the circumstances under which it came there. The case has been argued on the ground of necessity; but on that ground, at least, the necessity should be shown. There are, no doubt, various cases in which it has been held that the party is entitled to enter; but in all of them the peculiar circumstances have been stated on which the party has rested his claim to enter. It would be too much to infer that the party may enter in all cases where his goods are on the soil of another, because he may enter in some where he shows sufficient grounds for so doing.

ALDERSON, J. I am of the same opinion. The difficulty suggested as to an action of trover would apply to all cases of trover where a demand is necessary.

Judgment for plaintiff.

NANCY MALCOLM v. ELIJAH K. SPOOR.

(12 Met. 279. Supreme Court, Massachusetts, March Term, 1847.)

Trespass ab initio. An officer who enters a house by authority of law, and attaches goods therein, becomes a trespasser *ab initio* by placing there an unfit person, as keeper of the goods, against the remonstrance of the owner of the house.

SHAW, C. J. This was an action of trespass, in which the plaintiff declared against the defendant for breaking and entering her house, &c. The defendant justified under a writ directed to him, as constable, and commanding him to attach the plaintiff's household furniture.

The case comes before us on exceptions, from which it appears that the defendant was a constable, and that he entered the plaintiff's house, having a writ against her, and attached her furniture; that he took with him into the house a man who was intoxicated, whom he made keeper of the attached furniture, and left in the house in charge of the furniture, although the plaintiff objected to his remaining there as keeper, on account of his intoxication.

The exceptions also set forth the violent conduct of the keeper, and other matters, which are not material to the decisions of the question that is brought before us.

The Court of Common Pleas, in which the trial was had, instructed the jury that if the defendant, under color of his process, took with him a grossly intoxicated and clearly unfit person into the plaintiff's house, and left him therein as keeper, this was such an abuse of his authority as made him a trespasser *ab initio*; and that the defendant was answerable for all the acts of such keeper, done in pursuance of previous concert between them, or by direction of the defendant. A verdict was returned for the plaintiff; and the question whether these instructions were right has been submitted to us without argument.

It has been held as a rule of the common law, ever since the Six Carpenters' Case, 8 Co. 146, that where one is acting under an authority conferred by law, an abuse of his authority renders him a trespasser *ab initio*. *Melville v. Brown*, 15 Mass. 82. In the case before us, the defendant had authority by law to enter

the plaintiff's house, to serve legal process; but placing there an unfit and unsuitable person, to keep possession of the attached goods in his behalf, until he could remove them, against the remonstrance of the plaintiff, was an abuse of his authority, which rendered him liable as a trespasser *ab initio*.

An officer cannot legally stay in another's building, to keep attached goods therein, nor authorize any other person to remain therein, as keeper, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building, without rendering himself liable as a trespasser. See *Rowley v. Rice*, 11 Met. 337.

Exceptions overruled.

What constitutes a trespass (aside from the question of possession) will now be considered. The principal case, *Williams v. Esling*, finds frequent support among the authorities. In *Dougherty v. Stepp*, 1 Dev. & B. 371, which was trespass *quare clausum*, the only proof introduced by the plaintiff to establish an act of trespass was, that the defendant had entered on the uninclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. The judge at *nisi prius* held that this was not a trespass; but on appeal his decision was reversed. The amount of damages, said the Chief Justice, may depend upon the acts done on the land, and the extent of injury to it therefrom. But it was an elementary principle that every unauthorized entry into the close of another was a trespass; and from every such entry the law inferred some damage. And it was not material that the land was not inclosed; for so long as there was no adverse possession, the title made the land the plaintiff's close. Nor was the defence better in that the defendant entered claiming title. See upon this point *Baxter v. Taylor*, *ante*, p. 355.

In *Brown v. Manter*, 22 N. H. 468, an action for breaking and entering the plaintiff's close and cutting and carrying away timber, the evidence tended to show that the timber was not cut upon the plaintiff's land, but was merely drawn across; and it was held that even in such case the plaintiff could recover. The gist of the action of trespass, it was said, was the disturbance of possession. If the close was illegally entered, a cause of action at once arose; and whatever was done after entering was but aggravation of damages. See also *Mundell v. Hugh*, 2 Gill & J. 193; *Curtis v. Groat*, 6 Johns. 168; *Van Leuven v. Lyke*, 1 Comst. 515; *Smith v. Ingram*, 7 Ired. 175; *Dobbs v. Galdridge*, 4 Dev. & B. 68; *Wendell v. Johnson*, 8 N. H. 222; *Ferrin v. Simonds*, 11 N. H. 263; *Brown v. Manter*, 22 N. H. 468; *Taylor v. Cole*, 3 T. R. 292.

The doctrine of the principal case, *Anthony v. Haney*, that a person has no absolute right to enter upon the land of another to take away his own goods, is supported by the American cases. Thus, in *Heermance v. Vernoy*, 6 Johns. 5, a third person had sold a bark-mill to the defendant, and the land whereon

it stood to the plaintiff, and the defendant was held liable for entering and taking away one of the mill-stones. In *Blake v. Jerome*, 14 Johns. 406, the defendant was held liable for sending a third person upon the plaintiff's close to take away the defendant's mare and colt.

To the like effect is *Newkirk v. Sabler*, 9 Barb. 652. It is there repeated that the right to land is exclusive, and every entry thereon, without the owner's leave, or the license or authority of law, is a trespass. 3 Black. Com. 209. There was a variety of cases, it was observed, where an authority to enter is given by law; as to execute legal process, to distrain for rent, for a landlord or reversioner to see that his tenant does no waste and keeps the premises in repair, for a creditor to demand payment of money payable there, or for a person entering an inn for the sake of obtaining refreshment. 3 Black. Com. 212; 1 Cowen's Treat. 411. In some cases, the court proceeded to say, a license would be implied; as if a man make a lease reserving the trees, he has the right to enter and show them to the purchaser. 10 Coke, 46. The court also mentioned the following cases, in which an entry is justifiable: Where a man in virtue of license erects a building upon another's premises, the license cannot be revoked so completely as to make the person who erected it a trespasser for entering and removing it after the revocation. If J. S. go into the close of J. N., to succor the beast of J. N., the life of which is in danger, an action will not lie; because, as the loss of J. N., if the beast died, would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent

his corn from being consumed by hogs, or from being spoiled, trespass lies; for the loss, if either of those things had happened, would not have been irremediable. Bacon's Abr. Trespass, F. And if a stranger chase the beast of A., which is *damage feasant*, out of the close of B., trespass will lie; for by doing this, although it seem to be for his benefit, B. is deprived of his right to distrain the beast. Brown, Trespass, pl. 421; Keilw. 13, 46.

In some cases (it was further said in *Newkirk v. Sabler*) the entry will be excused by necessity; as, if a public highway is impassable, a traveller may go over the adjoining land. *Absor v. French*, 2 Show. 28; s. c. 2 Lev. 234. But this would not extend to a private way; for it is the owner's fault if he do not keep it in repair. *Taylor v. Whitehead*, 2 Doug. 745; 1 Saund. 321. So if a man who is assaulted, and in danger of his life, run through the close of another, trespass will not lie, because it is necessary for the preservation of his life. Year-Book, 37 H. 6, p. 37, pl. 26. If my tree be blown down, and fall on the land of my neighbor, I may go and take it away. Brown, Trespass, pl. 213. And the same rule prevails where fruit falls upon the land of another. *Milten v. Fawdry*, Latch, 120. But if the owner of a tree cut the loppings so that they fall on another's land, he cannot be excused for entering to take them away on the ground of necessity, because he might have prevented it. Bacon's Abr. Trespass, F.

A sale of chattels which are at the time upon the land of the seller will authorize an entry upon the land to remove them, if by the express or implied terms of the sale that is the place where the purchaser is to take them. *McLeod v. Jones*, 105 Mass. 403; *Wood v. Man-*

ley, 11 Ad. & E. 34; *Nettleton v. Sikes*, 8 Met. 34; *Giles v. Simonds*, 15 Gray, 441; *Drake v. Wells*, 11 Allen, 141; *McNeal v. Emerson*, 15 Gray, 384. A license is implied in this case because it is necessary to carry the sale into effect. It is therefore presumed to have been in the contemplation of the parties. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery by withdrawing his implied permission to come and take it. *McLeod v. Jones*, *supra*. Wells, J. But this does not apply to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance. *Ib.*

No such inference can be drawn when, by the terms of the contract, the property is not upon the seller's premises, or is to be delivered elsewhere. Where there is nothing executory or incomplete between the parties in respect to the property, and there is no relation of contract between them affecting it, except that which results from the fact of ownership or legal title in one, and possession in the other, no inference of a license to enter upon lands for the recovery of the property can be drawn from that relation alone. *Ib.*; citing 20 Viner's Abr. 508, Trespass, H, a, 2, pl. 18; *Williams v. Morris*, 8 Mees. & W. 488, and the principal case, *Anthony v. Haney*.

It follows, *a fortiori*, that one of several cotenants cannot enter upon the land of another of them to get possession of the common property, though he is, of course, entitled to such possession equally with his companions. Com. Dig. Trespass, D; 2 Rolle's Abr. 566, l. 30; *Herndon v. Bartlett*, 4 Porter (Ala.), 481; *Crocker v. Carson*, 33

Maine, 436. Nor can the bailor of goods enter the premises of the bailee, without permission, to take the goods. *Webb v. Beavan*, 6 Man. & G. 1055, note, citing Year-Book, 9 Edw. 4, p. 35; 20 Viner's Abr. 507, Trespass, H, a, 2, pl. 12, citing *Brown*, Trespass, pl. 208, and 21 Hen. 7, p. 13. And in a note to Viner it is said, "When a man bails goods to another to keep, it is not lawful for him, though the doors are open, to enter into the house of the bailee and to take the goods, but ought to demand them; and if they are denied, to bring detinue, and to obtain them by law."

Upon most of the above authorities it was held in *McLeod v. Jones* that a mortgagee of personal property has no right, by virtue of that relation merely, to enter upon the premises of the mortgagor, without legal process, to obtain the goods mortgaged. The plaintiff in that case had given a bill of sale and a mortgage to the defendant of furniture lying in his (the plaintiff's) dwelling-house. The plaintiff retained possession of the furniture, and, having removed it into another house, afterwards went away, leaving the furniture locked up in the house. The defendant had entered and carried away the furniture; and for this he was held liable to the plaintiff, having proved no license, express or implied.

Nor can there be any inference of a right to enter and remove a house belonging to the defendant, which is found, upon a survey of the premises, to have been built partly upon the plaintiff's land. *Bolling v. Whittle*, 37 Ala. 35.

The passage from Blackstone as to recaption, quoted by Tindal, C. J., in the principal case, *Anthony v. Haney*, was somewhat limited in *Patrick v. Colerick*, 3 Mees. & W. 483. In that case

a plea was sustained to a declaration for breaking and entering the plaintiff's close, that the defendant being possessed of certain goods, the plaintiff without his license took the goods and placed them upon the close in the declaration mentioned, wherefore the defendant made pursuit and entered and retook the goods. Mr. Baron Parke said that the passage in Blackstone, as to the right of recaption, applied to the case where the goods were placed on the ground of a third party. All the old authorities, he observed, said that where a party places the goods upon his own close, he gave to the owner of them an implied license to enter for the purpose of recaption. And the following was quoted from Viner's *Abr. Trespass*, 1, a: "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act." And the learned Baron added of *Anthony v. Haney* that it was not shown who placed the goods there; and that the mere fact of the defendant's goods being upon the plaintiff's land was no justification of the entry, unless it was shown that they came there by the plaintiff's act.

In *Chambers v. Bedell*, 2 Watts & S. 225, it was said to be certain that if the chattel of one man be put upon the land of another by the fault of the owner of the chattel, and not by the fault or with the connivance of the owner of the land, the owner of the chattel cannot enter to retake it; but that, if it be put there without the fault or consent of either party, the owner of the chattel might enter and take it peaceably, after demand and refusal of permission, if he repair any injury caused in taking it away. So, it was further said, where the parties are in equal default, as by

omitting to repair a partition fence, by reason of which the cattle of the one happens to stray into the close of the other. So, too, a person might lawfully enter and retake his property where it had been wrongfully taken or received by the owner of the land. See also *Newkirk v. Sabler*, *supra*, 380, where the plaintiff had sent his horses upon the land of the defendant, after being forbidden; and it was held that he could not enter upon the land and take them away.

A person may enter upon the close of another in certain cases to put there goods belonging to the owner of the land. In *Rea v. Sheward*, 2 Mees. & W. 424, the plaintiff declared in trespass for breaking and entering a building and close of the plaintiff, and removing certain goods from the building and depositing them upon the close. One of the pleas was that R. C., being seized in fee of the building, demised it to the defendants, who thereupon entered; and because the said goods were encumbering the building, the defendants removed them a small and convenient distance into the close of the plaintiff adjoining thereto, and there left them for the use of the plaintiff. The jury having found the fact that R. C. was seized in fee of the building, it was moved that judgment be entered for the plaintiff, *non obs. vered.* But the motion was overruled.

The decision was upon the authority of *Cole v. Maundy*, Viner's *Abr. Trespass*, 516, pl. 17 (1, a); s. c. Rolle's *Abr. Trespass*, 1, pl. 17, where it is said, "If a man comes into my close with an iron bar and sledge, and there breaks up my stones, and after departs and leaves the sledge and bar in my close, in an action of trespass for taking and carrying of them away, I may justify

the taking of them and putting them into the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff (as it was pleaded), inasmuch as they were brought into my close of his own tort; and in such case I am not bound to carry them to the pound, but may well remove the wrong done to myself by them by tort of the plaintiff."

And if there be a plea of leave and license the defendant must show that permission to enter was given by the plaintiff or by some one having due authority from him. It was accordingly held erroneous in *Cutler v. Smith*, 57 Ill. 252, to instruct the jury that there was no trespass if they found that the defendant had entered the plaintiff's house by her leave and license, or by the leave and license of any inmate thereof; since a mere stranger or trespasser might have been an inmate of the house.

There has been a line of cases in England concerning the right of a man to pull down a building, occupied or owned by another, the erection or condition of which is a nuisance. *Penraddock's Case*, 5 Coke, 100 b, *Jenkins's Centuries*, 260, was the first of these. There it was held by all the judges of England that if A. build a house so that it hangs over the house of B. and is a nuisance to him, B. may abate it, without first making request to A. to remove it; but if A. make a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continue, D. cannot abate it before request to C., for C. is a stranger to the wrong. But after request, and before prejudice sustained, D. may abate the nuisance. If, however, both houses be

purchased by one man, and he make several feoffments of them to several persons, the nuisance would be without remedy; for it was extinguished by the unity of estate in the purchaser, and the feoffee could not be in a better situation than his feoffor. But if the nuisances were increased after the feoffments, these would be new ones, and might be abated by the respective feoffees, without request.

This case has been somewhat modified by the later decisions. Thus, in *Perry v. Fitzhowe*, 8 Q. B. 757, it was held that there is no right to pull down the building while it is occupied. In that case the plaintiff brought trespass against the defendant for pulling down the former's house while actually occupied by his family. The defendant pleaded that he was entitled to common of pasture on a close appurtenant to the land upon which the house was erected; and that the house had been wrongfully erected on the close, so that he could not enjoy the common without pulling down the dwelling. Lord Denman, in delivering the judgment, said that no express authority on the point raised was to be found; but the case was compared to the law respecting distresses, in which, as in the abatement of a nuisance, the party injured takes the remedy into his own hands.¹ And he observed that the law certainly forbids the distraining a horse upon which a man is riding, or tools which he is using, on account of the imminent risk of a breach of the peace taking place if such a distress be made. The risk of a breach of the peace was much more imminent in the case of pulling down a house in which persons are actually living at the time. "The law," said he, "will not

¹ The right to enter and abate a nuisance is probably an archaic principle of the law. See note on Nuisance, *post*. And the same may be said of distress.

permit any man to pursue his remedy at such risks; and therefore we think it unnecessary for the plaintiff to show that there was an actual breach of the peace; and the imminent risk of it is sufficiently shown by the averment in the declaration that the plaintiff was in his own house at the time when the defendant committed the act complained of."

But this case does not appear to have given satisfaction except when confined to its facts. In *Burling v. Read*, 11 Q. B. 904, the plaintiff declared in a similar manner for pulling down his workshop while he was inhabiting and present in it, to which the defendant simply pleaded that the workshop was his, and not the plaintiff's; and the fact was found to be so. The allegation that the plaintiff was present in the workshop when it was being pulled down was held immaterial. "The plaintiff," said Lord Campbell, "is a trespasser. What right can he have to prevent the owner of the soil from pulling down the house? I pronounce no opinion against *Perry v. Fitzhowe*. I assume it to be right. But that case is clearly distinguishable from this, where the house is not the dwelling-house of the plaintiff, and where the act complained of is the act, not of a commoner who seeks to abate a nuisance, but of the owner of the house." Erle, J., said it was important to observe this distinction, otherwise parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut, and occupying it before morning. "It should be made known," said he, "that that is a misapprehension of *Perry v. Fitzhowe*."

In *Jones v. Jones*, 1 Hurl. & C. 1, Pollock, C. B., in the course of the argument, said: "The argument that

an act is unlawful because it may lead to a breach of the peace is very vague. What has a stronger tendency to a breach of the peace than the common *molliter manus imposit*, where one man comes into actual collision with another?" The case was very like *Perry v. Fitzhugh*; and the court said, "We decline to express any opinion as to whether, if this question had come before us for the first time, we should have concurred in the judgment pronounced by the Court of Queen's Bench in *Perry v. Fitzhowe*; but seeing that the question is of no importance, except as regards costs, we think it better, as the court is not unanimous, to abide by that decision, and leave the defendant, if dissatisfied with it, to take the case to a court of error."

Perry v. Fitzhowe, has also been departed from on the point of notice. In *Davies v. Williams*, 16 Q. B. 546, 555, Wightman, J., in delivering the judgment, said: "There is obviously a wide distinction between the case of parties suddenly coming to the dwelling-house alleged to be a nuisance, and in which the occupier and his family are actually dwelling, and in the house, and without notice or demand forcibly pulling it down, and a case in which the occupier of the house has had previous notice and been requested to remove the building, but has persisted in remaining in the house with his family in defiance of the notice and request." And the pleading in *Perry v. Fitzhowe* was criticised in that "those most important allegations" of notice and request were omitted.

Whether the mere taking possession of a chattel by virtue of a sale from one who had no authority to sell is a trespass without a demand by the owner is a point as to which the old

authorities are not clear, and the modern authorities are in conflict. In Massachusetts it has been decided that the defendant is liable, Mr. Justice Wilde dissenting. *Stanley v. Gaylord*, 1 Cush. 536, in which the early cases are reviewed. The majority of the court thought that trover would lie in such case, and held that, as a consequence, trespass could be maintained. Wilde, J., denied that trover could be brought in such a case, and thought that the defendant should have had an opportunity, by a demand made, to surrender the property before his possession could be regarded as tortious.

In Maine and New Hampshire the rule in *Stanley v. Gaylord* prevails. *Galvin v. Bacon*, 2 Fairf. 28; *Hyde v. Noble*, 13 N. H. 494.

In New York the contrary is held. *Marshall v. Davis*, 1 Wend. 109; *Nash v. Mosher*, 19 Wend. 481; *Barrett v. Warren*, 3 Hill, 348; *Pierce v. Van Dyke*, 6 Hill, 618. But in this State a distinction is made between the case of a delivery by the seller and a taking by the purchaser without delivery. "*Marshall v. Davis*," said the court in *Nash v. Mosher*, "seems to put the right to the action on the non-consent of the bailee. If it be delivered by the bailee, trespass lies not against the person to whom it is delivered. If sold or taken without delivery, trespass would lie for the taking; and such is the distinction which seems plainly to follow from the authorities cited by the Chief Justice, and the original *dicta* on which they rest." "A like distinction is made in respect to a gift or sale of

goods by an infant; if he deliver them, trespass lies not, but if taken without delivery, it lies. See Vin. Tresp. M, 12." See further, note on Conversion, *post*. It may be worthy of notice that in *Stanley v. Gaylord*, *supra*, the property was taken by the defendant without delivery; but the case was not decided upon this ground.

The foregoing principles result from the very definition of a trespass which, when applied to property, means a wrongful entry upon, or taking, or injury of real or personal property of a corporeal and tangible nature. 2 Hilliard, Torts, 71 (3d ed.). And this shows one of the distinctions between trespass and trover.¹ The latter action is a remedy only for the conversion of personal property. It results that a judgment in trespass is not necessarily a bar to an action of trover in respect of the same goods. *Ib.* p. 73. And the author just cited refers to the following case: "Thus, if, in trespass for taking cattle, the defendant justifies for a heriot, and obtains a verdict, yet, if it appear that the plaintiff mistook the nature of his action, and that he ought to have brought trover instead of trespass, this recovery cannot be pleaded in bar to trover for the cattle." *Putt v. Rawstern*, 3 Mod. 1. This case appears to be erroneously reported in 2 Mod. 318. See 2 W. Black. 779; 3 Mod. 2, note.

The principal case, *Malcom v. Spoor*, illustrates the principle that though a person's original act or conduct may have been lawful, there may afterwards be such an abuse of the powers or privileges which the law confers upon

¹ The distinction commonly made, that trespass is founded on possession and trover on property (1 Spence, Eq. 244), is in part unreal; for trover as well as trespass lies where there is but a bare possession, without property. See *Armory v. Delamirie*, *post*, 388. But trover, unlike trespass, may be maintained for property of which the owner (plaintiff) never had even a constructive possession. See note on Conversion, *post*.

him as will render him liable to an action as for a trespass in the first instance. 1 Hilliard, Torts, 118 (4th ed.).

Upon this principle rests the old doctrine of trespass *ab initio*, a doctrine which, by the quite general abolition of the distinction between trespass and case, has become of less importance than it formerly possessed.

It is worthy of notice that in those cases where the original entry or act was lawful (being justified by the license of the plaintiff or of the law), the subsequent abuse must be of such a character as to be in itself actionable. *Adams v. Rivers*, 11 Barb. 390. In this case Mr. Justice Willard, referring to the Six Carpenters' Case, said: "In all the cases put by Coke, the acts complained of as abuses of the power were distinct acts of trespass. And it seems to be the better opinion that a man cannot become a trespasser *ab initio* by any act or omission which would not itself, if not protected by a license, be the subject of trespass. Thus, in *Shorland v. Govett*, 5 Barn. & C. 485, the sheriff's officer justified a trespass under a *f. fa.*, and it was held that a demand by the officer of more than was due by the warrant did not make him a trespasser from the beginning. The reason is, that the original levy was lawful, and extortion is not an act for which trespass will lie." And the learned judge proceeds to refer to cases in which it is held that the subject of the action must be a positive act, and not a mere nonfeasance. *Gates v. Lounsbury*, 20 Johns. 429; *Gardner v. Campbell*, 15 Johns. 402; *Hale v. Clark*, 19 Wend. 498. But see *Adams v. Adams*, 13 Pick. 384; *Bond v. Wilder*, 16 Vt. 393.

In the Six Carpenters' Case, the

court took a distinction between a license by law and a license by the party. "It was resolved," says the report (8 Coke, 146), "when entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but where an entry, authority, or license is given by the party, and he [to whom it is given] abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. Another reason of this difference is, that in the case of a general authority or license of law, the law adjudges by the subsequent act *quo animo*, or to what intent, he entered, for *acta exteriora indicant interiora secreta*. Vide 11 Hen. 4, 75 b. But when the party gives an authority or license himself to do any thing, he cannot for any subsequent cause punish that which is done by his own authority or license." That is, the entry cannot be made unlawful in this case by any subsequent abuse; while it is otherwise where the license was given by law. In the former case the subsequent abuse is the gist of the action; in the latter the entry becomes the gist, and the abuse is only aggravation.

In *Allen v. Crofoot*, 5 Wend. 506, 509, it is said that a better reason for the above distinction is given in Bacon's Abr. Trespass, B, to wit: Where the law has given an authority, it is reasonable that it should make void every thing done by the abuse of that authority, and leave the abuser as if he had done every thing without authority. But where a man who was under no necessity to give an authority does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void every thing done by such abuse, because it was the man's folly to trust another with

an authority who was not fit to be trusted therewith. been applied to such a case, and that it was not necessary for the purposes of

In the above case of *Allen v. Crofoot*, permission to enter a house was obtained by fraud, and (there having been a subsequent abuse) it was contended that the license was void, and that the defendant must be considered a trespasser from the beginning. But the court held otherwise, saying that the principle of relation had never been applied to such a case, and that it was not necessary for the purposes of justice to extend it further than to cases where the person enters under a license given by law. "In such cases," it was observed, "as the party injured had not the power to prevent the injury, it seems reasonable that he should be restored to all his remedies." See further, as to trespass *ab initio*, 1 Smith's L. C. 277-279 (7th Am. ed.).

CONVERSION.

ARMORY v. DELAMIRIE, leading case.

BRISTOL v. BURT, leading case.

LOESCHMAN v. MACHIN, leading case.

DONALD v. SUCKLING, leading case.

Note on Conversion.

Historical aspects of the action of trover.

Possession and property.

What constitutes conversion.

Assertion of title.

Sale.

Disposal of qualified interest.

Disposal of part of a chattel.

Owner allowing another to sell his goods.

Surpassing limit of authority to sell.

Pledging goods.

Appropriating an article to different use from that intended.

Attachment of goods already levied upon.

Where goods are not converted to *defendant's* use.

Demand and refusal.

Acts of cotenants.

ARMORY v. DELAMIRIE.

(1 Strange, 505. In Middlesex, *coram* Pratt, C. J., 1722.)

The finder of a jewel may maintain trover against a stranger for its conversion.

THE plaintiff, being a chimney-sweeper's boy, found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:—

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a

property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect. *Jones v. Hart*, 2 Salk. 441, *cor.* Holt, C. J. ; *Mead v. Hamond*, 1 Strange, 505 ; *Grammer v. Nixon*, ib. 658.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth ; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages ; which they accordingly did.

BRISTOL v. BURT.

(7 Johns. 254. Supreme Court, New York, November, 1810.)

To constitute a conversion, sufficient to support trover, it is not necessary to show a manual taking of the thing in question ; nor that the defendant has applied it to his own use ; but the assuming the right to dispose of it, or exercising a dominion over it, to the exclusion or in defiance of the plaintiff's right, is a conversion.

THIS was an action of trover, brought to recover the value of ninety-five barrels of potashes. The cause was tried at the Onondaga Circuit, the 7th of June, 1810, before the Chief Justice.

The defendant was in 1808, and still is, the collector of the port of Oswego, on the south side of Lake Ontario. In May, 1808, the defendant was applied to, to know whether he would grant clearances for ashes for the port of Sackett's Harbor, which is the next adjoining port in the county of Jefferson, and on the south side of the lake, and adjacent to the province of Canada. The defendant answered that he did and should continue to grant clearances ; and the defendant was informed of the intention of the plaintiff to bring ashes to Oswego, for the purpose of sending them to Sackett's Harbor. About the 1st of July, the plaintiff sent ninety-five barrels of potashes to Oswego, which were put

into the store of a Mr. Wentworth, who gave the plaintiff a receipt for them. The plaintiff applied to the defendant for a clearance, in order to transport the ashes to Sackett's Harbor; but the defendant refused to grant it, alleging as a reason for his refusal that though he did not suspect the plaintiff intended to send the ashes to a British port, yet he believed that the collector at Sackett's Harbor would not do his duty, and that the ashes would be sent thence to a British port. The defendant at the same time promised the plaintiff that, if he did not receive instructions to the contrary from the Secretary of the Treasury within a fortnight, he would give a clearance to the plaintiff's ashes. After the expiration of that time, the defendant still refused to grant the clearance, though he admitted that he had received no new instructions from the Secretary of the Treasury, nor had he received any instructions forbidding such clearances. He assigned no other reason for his refusal than his suspicion that the collector at Sackett's Harbor would not do his duty; and persisted in refusing a clearance, though the plaintiff offered to give bonds that the ashes should be delivered at Sackett's Harbor. The plaintiff then expressed his desire to take the ashes up the river; but the defendant declared that the plaintiff should not take them from Wentworth's store, unless he gave bonds for double the value of the property, to carry the ashes to Rome, in the county of Oneida, and leave them there, while the embargo continued; that the property was under his jurisdiction and charge; that he had control over all the stores and wharves where ashes were placed, and had employed armed men; and that he had the right to prevent their removal, and would exercise it. Two armed men were stationed near Wentworth's store during two nights, and an armed sentinel was constantly on duty, night and day, at the public store of the collector, within ten rods of Wentworth's store, and in view of it, for the purpose of observing boats, and preventing the removal of the property. The defendant avowed his determination not to permit any ashes to be removed from any of the stores in Oswego. The defendant demanded the ashes in question from Wentworth, who refused to deliver them; but, in order to prevent the defendant from proceeding to extremities, and to satisfy him, Wentworth entered into an agreement with the defendant not to deliver any property from his store without the permission of the defendant.

In the autumn of 1808 the defendant gave a general permission to remove any ashes from Oswego up the river, and thirteen barrels of the potash of the plaintiff were delivered by Wentworth to his order.

On the 13th February, 1809, the defendant gave a written permit to carry the remaining eighty-two barrels of potashes from Oswego to Rome, in the county of Oneida, requiring of the person to whom they were delivered by order of the plaintiff a written report of the ashes, and an oath that the statement was true, and that he did not intend to violate the law.

It was proved that, when the plaintiff applied to the defendant for a clearance to Sackett's Harbor, potashes were worth at that place \$180 per ton, and that the expense of transportation was \$4 per ton. That the price of potashes on the 21st July, 1808, in the city of New York, was \$173 per ton, but would not sell at Salina, in the county of Onondaga, for more than \$150. That when the plaintiff received the ashes, the price of them, in the city of Albany, was \$173.50, and the expense of transportation from \$25 to \$30 per ton.

The Chief Justice charged the jury that, in his opinion, there was sufficient evidence of a conversion by the defendant, and that the plaintiff was entitled to recover for the difference in the value of the ashes at the time when he demanded a clearance and at the time he received them. And the jury found a verdict for the plaintiff, for \$1,472.20.

A case was made for the opinion of the court, which it was agreed might be turned into a special verdict.

Gold, for the plaintiff. *Cady*, contra.

PER CURIAM. The only point made in this case is, whether there was sufficient evidence of a conversion to justify the verdict.

There were declarations and acts of the defendant united to form a control over the plaintiff's property. The very denial of goods to him that has a right to demand them, says Lord Holt, in *Baldwin v. Cole*, 6 Mod. 212, is a conversion; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without a cause, takes upon himself the right of disposing of them. The bare denial to deliver is not always a conversion, as in *Thimblethorpe's Case* (cited in

Bulst. 310, 314), where a piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no act done or dominion exercised; but in the present case there were the highest and most unequivocal acts of dominion and control over the property; not only by claiming jurisdiction over it, but in placing armed men near it to prevent its removal. This fact is of itself a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the storehouse. It was, therefore, bringing a charge upon the plaintiff; and this, says Mr. Justice Buller, in *Syeds v. Hay*, 4 Term Rep. 260, amounts to a conversion. Neither the case of *M'Combie v. Davies*, 6 East, 538, nor the anonymous case in 12 Mod. 344, were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by Lord Ellenborough the test of the conversion, though the property in that case lay not in the defendant's, but in the king's warehouse. The definition of a conversion in trover, as given by Mr. Gwillim, the editor of Bacon, and now a judge in India, applies precisely to this case. 6 Bac. Abr. 677. "The action being founded upon a conjunct right of property and possession, any act of the defendant," says he, "which negatives, or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use."

We are, therefore, of opinion that the motion to set aside the verdict must be denied. *Motion denied.*

LOESCHMAN v. MACHIN.

(2 Stark. 811. King's Bench, *Nisi Prius*, Hilary Term, 1822.)

The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of a conversion; and so is the auctioneer who refuses, unless the expense incurred be first paid, to deliver it up.

THIS was an action of trover, brought to recover the value of two piano-fortes.

The plaintiff was a maker of piano-fortes, and the defendant was an auctioneer. The plaintiff had lent one of the pianos, the larger, to a person of the name of Brown, whose wife was a musical teacher, on hire, for which Brown was to pay at the rate of 18s. per month, if he kept it for the whole year; and if for a less period, he was to pay a guinea per month. With respect to the other piano, it did not appear very clearly on what terms it had been delivered by the plaintiff to Brown, whether upon hire, or that he might dispose of it for the plaintiff. Brown had sent both these pianos to the defendant, to be sold by auction, and he, upon the plaintiff's application to deliver the pianos to him, refused to deliver them unless the plaintiff would pay the amount of certain expenses which had been incurred.

ABBOTT, J., in summing up to the jury, said, I wish you to find whether the smaller piano was let on hire, or sent to be sold by Brown, if an opportunity offered; this is a question of fact for your consideration; and although I am of opinion that it will make no difference as to the verdict, it will give the party an opportunity of making the distinction. The general rule is, that if a man buy goods, or take them on pledge, and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser; except, indeed, in the case of a sale in market overt. With that exception, it is incumbent on the purchaser to see that the vendee has a good title. And I am of opinion that if goods be let on hire, although the person who hires them has the possession of them, for the special purpose for which they are lent; yet, if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that if the auctioneer afterwards refuse to deliver them to the owner, unless

he will pay a sum of money which he claims, he is also guilty of a conversion.

The jury found that the smaller piano had been sent to Brown for the purpose of sale, and the plaintiff had a verdict for the value of both the pianos.

Leave was given to *Marryatt*, for the defendant, to move the point.

Scarlett and *Campbell*, for the plaintiff. *Marryatt* and *Chitty*, for the defendant.

DONALD v. SUCKLING.

(Law R. 1 Q. B. 585. Queen's Bench, England, July, 1866.)

Detinue. Repledge of pledge. A. deposited debentures with B. as a security for the payment, at maturity, of a bill indorsed by A. and discounted by B., on the agreement that B. should have power to sell or otherwise dispose of the debentures if the bill should not be paid when due; before the maturity of the bill, B. deposited the debentures with C., to be kept by him as security until the repayment of a loan from C. to B. larger than the amount of the bill. The bill was dishonored; and while it still remained unpaid, A. brought *detinue* against C. for the debentures. *Held* (by Cockburn, C. J., Blackburn and Mellor, JJ., Shee, J., dissenting), that the repledge by B. to C. did not put an end to the contract of pledge between A. and B., and B.'s interest and right of detainer under it; and that A., therefore, could not maintain *detinue* without having paid or tendered the amount of the bill.

DECLARATION. That the defendant detained from the plaintiff his securities for money, that is to say, four debentures of the British Slate Company, Limited, for 200*l.* each, and the plaintiff claimed a return of the securities, or their value, and 1,000*l.* for their detention.

Plea. That before the alleged detention the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Sanders, and indorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been

paid by the plaintiff, nor by any other person, but was dishonoured ; nor was it paid at the time of the said detention, or at the commencement of this suit ; and that, before the alleged detention and the commencement of this suit, Simpson deposited the debentures with the defendant, to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security of the debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money thence hitherto have been and remain wholly due and unpaid to the defendant ; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

The case having been argued in Easter Term (April 27), before Blackburn and Shee, JJ., was reargued in Trinity Term.

Harington, for the plaintiff. *Gray*, Q. C. (*Gadsden* with him), for the defendant. *Cur. adv. ult.*

SHEE, J. [after stating the pleadings]. This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the overplus above the amount of the bill and charges to the plaintiff, — that is, to sell on the plaintiff's account and for his and Simpson's benefit, — and a repawn of them by Simpson, as a security for a loan to him by the defendant.

It must be taken against the defendant that the debentures were pledged to him by Simpson before the plaintiff had made default ; it must be taken, too, that the advance for which the debentures were pledged to the defendant by Simpson was of a greater amount than the debt for which Simpson held them ; it is consistent with the facts pleaded either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson along with other securities, from which they could not at Simpson's pleasure, or on tender by the plaintiff of the sum for which they had been pledged to Simpson, be detached ; and, therefore, that Simpson had put it out of his power to apply them by sale or otherwise to the only purpose for which possession of them had been given to him, viz., to secure the payment of his debt and the release of the

plaintiff, by the sale of them, from liability on the bill which Simpson had discounted for him.

Whether this pledge to the defendant by Simpson was such a conversion by him of the debentures as destroyed his right of possession in them, and revested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision.

The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was before the case of *Johnson v. Stear*, 15 C. B. N. s. 380, 38 L. J. C. P. 180, if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones (on Bailments, pp. 118, 36) to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged;" and by Lord Holt (*Coggs v. Bernard*, 2 Ld. Raym. at p. 918) to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor;" and by Lord Stair (*Institutions of the Law of Scotland*, b. 1, tit. 13, § 11), "a kind of mandate whereby the debtor for his creditor's security gives him the pawn, or thing impignorated, to detain or keep it for his own security, or, in the case of not-payment of the debt, to sell the pledge and pay himself out of the price, and restore the rest, or restore the pledge itself on payment of the debt,—all which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispoise in the case of not-payment;" and by Bell (*Principles of the Law of Scotland*, §§ 1362, 1363, 4th ed. p. 512), "a real right, or *jus in re*, inferior to property, which vests in the holder a power over the subject, to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledger or owner."

In the Roman civil law, as in our law (see *Pigot v. Cubley*, 15 C. B. N. s. 701; 38 L. J. C. P. 134), the bailment of pawn implied what in this bailment is expressed,—a mandate of sale on default of payment. Without it, or without, as in the Scotch and French law, a right to have a pledge sold judicially for payment on default made, the security by way of pledge would be of little value. The pawnee is said by Lord Coke, in his *Commentaries on Littleton*, Co. Litt. 89 a, to have a "property;" and in *Southcote's Case*, 4 Rep. 83 b, to have a "property in, and not

a custody only," of the chattel pawned; by which Lord Holt (2 Ld. Raym. at pp. 916, 917) understands Lord Coke to mean a "special property," consisting in this, "that the pawn is a security to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him;" or, in the words of Fleming, C. J., in *Ratcliff v. Davis*, Cro. Jac. at p. 245, "a special property in the goods to detain them for his (the pawnee's) security;" that is, not a property properly so called, but the *jus in re*, that is, *in re aliena* of the Roman lawyers, the opposite, as Mr. Austin says (Lectures on Jurisprudence, Tables and Notes, vol. 8, p. 192), to property; but a right of possession against the true owner, and under a contract with him until his debt is paid, and a power of sale for the reciprocal benefit of the pawnee and pawnor on default of payment at the time agreed upon.

Mr. Justice Story says (on Bailments, § 324) that "the pawnee may by the common law deliver the pawn into the hands of a stranger without consideration, for safe custody, or convey the same interest conditionally by way of pawn to another person, without destroying or invalidating his security, but that he cannot pledge it for a debt greater than his own; that if he do so, he will be guilty of a breach of trust, by which his creditor will acquire no title beyond that of the pawnee; and that the only question which admits of controversy is, whether the creditor shall be entitled to retain the pledge until the original debt (that is, the debt due to the first pawnee) is discharged, or whether the owner may recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee." So much of this passage as is stated to be clear law, viz., that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (i.e., it may be presumed, on the same conditions as those on which he holds it) by way of pawn to another person for a debt not greater than his own, without destroying or invalidating his security, has no application to the case before us, inasmuch as the pawn by Simpson to the defendant was not for safe custody, nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson, and because the power given to the pawnee by this bailment to dispose of the debentures by sale or otherwise, should this debt not be paid, might probably be considered, at least after default

made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by the way of query, to the position that a pawnee, who, as in this case, has placed the chattel pawned out of the pawnor's power, and out of his own power to redeem it, by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor's debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr. Justice Story, indeed, says (on Bailments, § 299), "that if the pledgee voluntarily and by his own act places the pledge beyond his power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of the pledge." It would be difficult to reconcile any other rule in respect of the pledging by pledgees of the chattels pawned to them with the well-established doctrine of our courts and the courts of the United States of America in respect of the pledging by factors of the goods intrusted to them. Factors, like pledgees, have a mandate of sale, — sale irrespectively of default of any kind is the object of the bailment to them; they have a special property and right of possession against all the world except their principal, and against him if they have made advances on the security of his goods intrusted to them; to give effect to that security, they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their advances, the pawnee from them (except under the Factors Acts) is defenceless, in trover or detinue, even to the extent of his loan, against the true owner.

Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods, no reason was adduced during the argument before us, nor, indeed, was it possible to adduce any reason, seeing that in all the decisions on pledges by factors the relation between a factor who has made advances on the goods intrusted to him and his principal has been held not distinguishable, or barely distinguishable, in its legal incidents from the relation between pawnee and pawnor; a factor being, as Mr. Justice Story says, "generally treated in juridical discussions as in the condition of a pledgee." On Bailments,

§§ 325, 327; citing *Daubigny v. Duval*, 5 T. R. 604; *M'Combie v. Davies*, 7 East, 5.

The case of *Johnson v. Stear*, 15 C. B. n. s. 330, 33 L. J. C. P. 130, is a clear authority for holding that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and unless that case is also an authority binding upon us for the doctrine that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him, and in an assignee from him, and in an assignee from his assignee, and so on *toties quoties*, without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment.

As I read the case of *Johnson v. Stear*, and the cases of *Chinery v. Viall*, 5 H. & N. 288, 29 L. J. Ex. 180, and *Brierly v. Kendall*, 17 Q. B. 937, 21 L. J. Q. B. 161, on the authority of which it proceeded, the judgments of the majority of the learned judges of the Court of Common Pleas in the first of them, and the judgments of the Court of Exchequer and of the Court of Queen's Bench in the second and the third, are based on the principle that, in an action to recover damages for a conversion, it is not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages; that when a suitor's real cause of action is a breach of contract, he cannot by suing in tort entitle himself to a larger compensation than he could have recovered in an action in form *ex contractu*; and therefore that, when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited, in the estimate by the jury of the damages to be paid by him, for the value of such interest or advantage as would have resulted to him from the contract of sale or the contract of pawn, if it had been fulfilled by the vendee or pawnor.

That this was the *ratio decidendi* in these cases seems to me clear from the facts of *Chinery v. Viall* and *Brierly v. Kendall*, which raised no question between the litigant parties in any respect analogous to the question which we in this case have to

decide. In *Chinery v. Viall*, the plaintiff, who was the vendee of forty-eight sheep, for five only of which he had paid, under a bargain which entitled him to delivery of the whole lot before payment, brought his action against the vendor for a conversion by parting with the sheep to another purchaser. If the defendant's interest in the unpaid balance of the agreed price of the sheep had not been credited to him in the amount of damages, the plaintiff, who had only paid for five of them, would have pocketed the full value of the forty-three which had been converted.

In *Brierly v. Kendall*, 17 Q. B. 937, 21 L. J. Q. B. 161, an action of trespass, there was a loan of the defendant to the plaintiff, secured by bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods until he should make default in some payment. Before any default the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was considered in measuring the extent of the plaintiff's right to damages.

These cases are manifestly not in conflict with, if indeed they at all touch, the principle relied upon against the plea which is here demurred to, that, if the pawnee converts the chattels pawned to him, the bailment is determined and the right of possession revested in the true owner of them.

In *Johnson v. Stear*, 15 C. B. N. S. 330, 33 L. J. C. P. 130, the defendant, a pawnee of dock warrants, had anticipated by a few hours only the time at which, under his contract with the owner of them, he might have sold and delivered them; he had applied before the time of action brought the proceeds of their sale to the discharge of the plaintiff's debt to him, or he held them specially applicable to that purpose, and the plaintiff, had he sued the defendant in contract for not keeping the pledge until default made, could not have proved that he had sustained any damage. The Chief Justice, speaking for himself and two of his learned brothers, did, indeed, say that "the deposit of the goods in question with the defendant, to secure repayment of a loan to him on a given day, with a power to sell in case of

default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract." 15 C. B. N. s. 334, 335, 33 L. J. C. P. 131. But he cannot be understood to have meant by the words "interest and right of property in the goods," and by the words "more than a mere lien," other than "a special property," as defined by the authorities before referred to by me, viz., a real right or *jus in re*, a right of possession until default made, a right of retention or sale after default made; nor, as I think, to have intended more, by the words "the wrongful act of the pawnee did not annihilate the contract between the parties," than that the contract, in the breach of which consisted the tort of which the plaintiff complained, must still be considered to subsist, at least for the purpose of being referred to for the measure of the damage sustained by the pawnor and the damages to be recovered by him.

The case before us differs, as I think, in essential particulars, as respects the principle upon which damages would have been measurable, had the action been in trover, from the case in the Common Pleas. The defendant, as assignee of the pawnee, could not surely have set up in mitigation of damages an interest derived by him from the pawnee before default made by the pawnor; the pawnee, by the express terms of the bailment to him, not having the right to dispose of the debentures by sale or otherwise until after default made. Besides, it is impossible to shut one's eyes to the broad distinction between the case of the sale a few hours too soon of a pawn, which, as in the case of *Johnson v. Stear*, 15 C. B. N. s. 330, 33 L. J. C. P. 130, the pawnor "had no intention to redeem,"—the proceeds of the sale being devoted before action brought to the discharge of the debt for which the pawn had been given as a security,—and the abuse of a pawn by the pawnee in wrongfully, for his own purposes, placing it out of his power, and out of the pawnor's power, to redeem the pawn, should he have the means to do so.

By the contract of bailment between the plaintiff and Simpson, the proceeds of the sale of the debentures, which are the subject of this suit, had been specifically appropriated to the payment of the plaintiff's bill in the event of his not being able to

meet it with other means. Simpson held the debentures in trust, should the bill not be paid, to sell them on the plaintiff's account, or allow the plaintiff to sell them or raise money on them to pay his bill. Instead of that, Simpson, before default made by the plaintiff, converted them to his own use, obtaining their agreed value in pledge from the defendant, and imposing upon the plaintiff the burden of making other provisions to meet his bill. By this act of Simpson, the plaintiff, in my judgment, did in fact sustain damage, and at the maturity of the bill, if not before, to the full amount of the current salable value of the debentures. I am at a loss to see how the conduct of Simpson, in thus dealing with the debentures, and how the title of the defendant, claiming under him, are to escape the operation of the rule, that if the pawnee, except conditionally (an exception for which the authority is but slender), parts with the possession of the pawn, he loses the benefit of his security: *Ryall v. Rolle*, 1 Atk. 165; *Reeves v. Capper*, 5 Bing. N. C. 136; *Johnson v. Stear*, 15 C. B. N. s. 330, 33 L. J. C. P. 130, per Williams, J.; or the operation of the maxim, *nemo plus juris ad alium transferre potest quam ipse habet*.

For these reasons, as it seems to me, the case of *Johnson v. Stear*, 15 C. B. N. s. 330, 33 L. J. C. P. 130, ought not to govern our decision. It could not be followed by us as an authority in favor of the defendant without inattention to its true principle, viz., that between the parties to a contract the measure of damages for a breach of the contract must be the same, whether the form of action be *ex contractu* or *ex delicto*, and that in such a case general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice. It is open also, in a right estimate of it as an authority for the case in hand, to this observation: The interest of a plaintiff in the damages recoverable by him for a tort, which is in its true nature a breach of contract, is restricted by the implied stipulations of the contracting parties to the amount which, in the conscience of a jury, may suffice to give him an adequate compensation. The action of detinue for a chattel, of which the bailment has been abused, against a person not a party to the contract of bailment, is not based upon a breach of contract, and not within the rules applicable to actions of tort which are based on breaches of contract.

In detinue the plaintiff sues, not for the value tantamount of the thing detained from him, but for the return of the thing itself, which may to him have a value other and higher than its actual value; and only for its value if the thing cannot be delivered to him: Tidd's Forms (8th ed. 339); and for damages for its detention and his costs of suit: *Peters v. Heyward*, Cro. Jac. 682; the integral, undiminished thing itself, unaffected by countervailing lien or abatement of whatever kind, being the primary object of the suit. In an action of trover for the conversion by the pawnee of the subject of the bailment, the plaintiff, according to the judgment of the majority of the court in *Johnson v. Stear*, 15 C. B. N. S. 330, 33 L. J. C. P. 130, is entitled only to recover the amount in money of the damage which he proves himself to have sustained. In an action of detinue for the recovery from the assignee of the pawnee of the chattel pawned, and of which the pawn has been abused and forfeited, the plaintiff is entitled to recover the chattel itself, because it was a term of the contract of pawn that if the pawn should be abused by the pawnee his right to the possession of it should cease; and the defendant can have derived no right of possession from one whose own right of possession was determined by his attempt to transfer it.

Unless, therefore, we are prepared to hold, in disregard of the clearly expressed opinion of Story and Mr. Justice Williams, that detinue can in no case lie for an unredeemed pawn, however much the bailment of it may have been abused, we are not at liberty to apply the *ratio decidendi* in *Johnson v. Stear*, 15 C. B. N. S. 330, 33 L. J. C. P. 130, to the case before us.

It raises a strong presumption against the defence set up in this plea, that nothing bearing the slightest resemblance to the right of possession, which it claims for the assignee of a pawnee, is to be found in the copious title of the digest, Dig. lib. 20, tit. 1, "De pignoribus et hypothecis; et qualiter ea contrahantur, et de pactis eorum," or in the five following titles of the contract of pawn and hypothec and its incidents, or in the title "De pigneratitia actione, vel contra," Dig. lib. 13, tit. 7, or in the works of any English, French, or Scotch jurist.

The *dictum* of the majority of the court in the case of *Mores v. Conham, Owen*, 123, 124, that the pawnee has such an interest in the pawn as he may assign over, was not the point decided in that case, nor, as it seems to me, a point essential to

its decision ; the point decided being that the surrender by the plaintiff of a chattel pawned to him by a third person was a good consideration for a promise by the defendant to pay the debt for which it had been given as security. It does not seem to follow from that decision that the surrenderee thereby acquired such an interest in the pawn as would enable him to defend an action of detinue at the suit of the true owner, the reunion of whose rights of property and possession was, unless they meant to rob him, the real object of the transaction. The inference drawn from this very obscure and superficially reasoned case in favor of the defendant's plea is wholly irreconcilable with the doctrine of Domat, the highest authority on all questions depending, as this question does, upon the rules and principles of the Roman civil law, that the bailments of "hypothèque" and "gage" last only as long as the thing hypothecated is in the hands of the person charging it, or the thing pawned in the hands of him who takes it for his security, Domat, *Lois Civiles*, liv. 3, tit. 1, § 1, and with the doctrine of Erskine, a jurist of nearly equal eminence, that "in a pledge of movables the creditor who quits the possession of the subject loses the *real right* he had upon it." Institutes of the Laws of Scotland, b. 3, tit. 1, § 33.

I think that the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea ; that both of them have been guilty of a conversion ; that the plaintiff might, as Mr. Justice Williams said in the case of *Johnson v. Stear*, 15 C. B. N. s. at p. 341, 33 L. J. C. P. at p. 134, lawfully, should the opportunity offer, resume the possession of the debentures, and hold them freed from the bailment, and may, the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill, recover them, or their full value, if they cannot be delivered to him, in this action of detinue.

MELLOR, J. [after stating the declaration and plea]. To this plea the plaintiff demurred ; and upon demurrer I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before the default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of

larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson. The question thus raised by this plea is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by repledging such debentures and depositing them with a third person as a security for a larger amount, before any default in payment by the pawnor, make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. If the affirmative of this proposition be maintained, the result seems *prima facie* to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this court must give effect to them. There is a well-recognized distinction between a *lien* and a *pledge*, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an agreement of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods, which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods to secure the payment of money at a certain day, on default by the pawnor the pawnee may sell the goods deposited and realize the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. It is said by Mr. Justice Story on Bailments, tit. Pawns or Pledges, § 811, that "the foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances." The question thus arises, Is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit, by way of pledge for securing the due payment of money, than in the incidental power of sale in the latter case on condition broken? In other words, on a contract of pledge, it is implied that the pledgee shall

not part with the possession of the thing pledged until default in payment; and, if so, is that of the essence of the contract, *so that the violation of it makes void the contract?*

In the case of *Legg v. Evans*, 6 M. & W. 36, 41, an action of trover having been brought against the defendants, as sheriff of Middlesex, to recover the value of some pictures and picture-frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied setting up a lien in respect of work done upon such goods and chattels, which had been delivered to him in the way of his trade by one Williams, and further set up an agreement between the plaintiff and Williams that the plaintiff should draw and indorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and he alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea; and Parke, B., is reported to have said: "If we consider the nature of a lien and *the right* which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a *personal right* which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a personal interest in the goods." And farther on he said, "Here the interest cannot be transferred to any other individual; it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant." In that case there was superadded to the lien in respect of work done an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right "to hold" to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and indorsed by him. It is, therefore, an authority to the effect that in the case of lien, even to secure payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and a right to hold by way of lien to secure the same object. In *Pothonier v. Dawson*, Holt, N. P. at p. 385, cited in argument in *Legg v. Evans*, 6 M. & W. at p. 40, Gibbs, C. J., said, "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are *deposited by way of security*, to indemnify a party against a loan of money, it is more than a pledge. [*Quere*, whether "pledge" should not be read "lien."] The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade."

It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words "special property," as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In *Legg v. Evans*, 6 M. & W. at p. 42, the nature of a lien is defined to be a "personal right which cannot be parted with;" but "the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation." Story on Bailments, § 311. In each case the *general property remains in the pawnor*; but the question is as to the nature and extent of the interest or special property passing to the bailee in the two cases. Mr. Justice Story, in his Treatise on Bailments, § 324, thus describes the right and interest of the pawnee: "He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee."

In *M'Combie v. Davies*, 7 East, 5 (see pp. 6 and 7), it appeared that a broker had for a debt of his own pledged with the defendant certain tobacco of his principals, upon which he had a lien; and in an action brought by the principal against the defendant in trover for the tobacco, Lord Ellenborough being of opinion "that the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal," the plaintiff obtained a verdict; and upon motion for a new trial Lord Ellenborough said that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods;" but he afterwards added "that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them as *his own*, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods on which he has the lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him."

It would therefore seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet where he pledged the goods on which he had a lien tortiously, neither the factor nor his pawnee could retain them even for the payment of the amount of the original lien. The case of *M'Combie v. Davies*, 7 East, 5 (see pp. 6 and 7), shows that the factor's or broker's lien, although simply a right to retain possession as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign it only as a security to the like amount as that due to himself. Still the character of the transaction is that of lien, and not of deposit, by way of pledge; and although the goods were intrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them; and, if he did, the act was an essential violation of the relation betwixt him and his principal, and entitled the latter at once to the recovery of the value of the goods in trover. "But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee," as was

said by the court in *Smart v. Sandars*, 3 C. B. at pp. 400, 401; and see s. c. after amendment of pleadings, 5 C. B. at p. 917.

There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Legg v. Evans*, 6 M. & W. 36, and the lien of a broker or factor before the Factors Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage. Notes to *Coggs v. Bernard*, 1 Smith's L. C. 194 (5th ed.). A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident, that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, "appointing him as his servant to keep possession for him." In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the mean time part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right of possession in the pawnor; but, in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us, we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In *Johnson v. Stear*, 15 C. B. N. s. 330, 33 L. J. C. P. 130, one Cumming, a bankrupt, had deposited with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for £62 10s., discounted by the defendant, and which would become due January 29, 1863; and in case such acceptance was not paid at maturity, the defendant

was to be at liberty to sell the brandy, and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of *trover*, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner in selling; and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendee in pursuance of such sale, he "interfered with the right which the bankrupt had on the 29th, if he repaid the loan;" but the majority of the court (Erle, C. J., Byles and Keating, JJ.) held, that the plaintiff was only entitled to nominal damages, on the express ground that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created "*an interest and a right of property in the goods, which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.*" See 15 C. B. N. s. at pp. 334, 335; 33 L. J. C. P. at p. 131. From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground "that the bailment was terminated by the sale before the stipulated time, and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place." See 15 C. B. N. s. at p. 340; 33 L. J. C. P. at p. 134. Although the dissent of that most learned judge diminishes the authority of that case as a decision on the point, and although it may be open to doubt whether in an action of *trover* the defendant ought not to have succeeded on the plea of not possessed, and whether the plaintiff's only remedy for damages was not by action on the contract, I am, nevertheless, of opinion that the substantial ground upon which the majority of the court proceeded, viz., that the "act of the pawnee did not annihilate the contract, nor the interest of the pawnee in the goods," is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of

lien, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited ; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet if, nevertheless, he does pledge the goods to a third person for a greater interest than he possesses, such an act does not *annihilate the contract of pledge* between himself and the pawnor, but that the transaction is simply inoperative as against the original pawnor, *who upon tender of the sum secured immediately becomes entitled to the possession of the goods*, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods ; and I think that such is the true effect of Lord Holt's definition of a " vadium or pawn " in *Coggs v. Bernard*, 2 Ld. Raym. at pp. 916, 917. Although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrong-doer, his special property being determined ; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to determine this case in favor of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been made by the plaintiff ; and, considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question.

I am, therefore, of opinion that our judgment should be for the defendant.

BLACKBURN, J. [after stating the pleadings]. The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonor of the bill of exchange ; and as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonored, and consequently at a time when Simpson was not yet entitled by

virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures, and no more. We must, I think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay, the bill would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and so the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither having paid nor tendered the amount for which he had pledged them with Simpson. In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him; and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures.

The question, therefore, raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated in the plea, put an end to that interest and right of detention till the bill of exchange was honored, which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention; and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent to which the factor was in advance, proceed on this

ground. In *Daubigny v. Duval*, 5 T. R. at p. 606, Buller, J., puts the case on the ground that "a lien is a personal right, and cannot be transferred to another." In *M'Combie v. Davies*, 7 East, at p. 6, Lord Ellenborough puts the decision of the court on the same ground, saying that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any tortious pledge of the principal's goods." Story, in his *Treatise on Bailments*, §§ 325, 326, and 327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the legislature has intervened, and in all cases of pledges by agents, within the Factors Acts, the pledge is now available to the extent of the factor's interest.

But, on the facts stated on the plea, Simpson was not an agent within the meaning of the Factors Acts; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien properly so called, an interest in the property, or real right, as distinguished from a mere personal right of detention. I think that, both in principle and on authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by actual delivery of the thing), does give the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though there was no actual delivery of the possession; but the right of hypothec is not recognized by the common law. Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself. *Howes v. Ball*, 7 B. & C. 481. I mention this because in the argument several authorities, which only go to show that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property.

The effect of the civil law is thus stated by Story, in his *Trea-*

tise on Bailments, § 328: "It enabled the pawnee to assign over, or to pledge the goods again, to the extent of his interest or lien on them; and in either case the transferee was entitled to hold the pawn, until the original owner discharged the debt for which it was pledged. But beyond this the (second) pledge was inoperative, and conveyed no title, according to the known maxim, *nemo plus juris ad alium transferee potest quam ipse haberet*."

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the court in *Mores v. Conham*, Owen, 123, 124, where the court say that the pawnee is responsible "if he misuseth the pawn; also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to detain it if he detains it upon payment of the money by the owner." It is true that one judge, Foster, J., dissented on this very point. That may so far weaken the authority of the decision; but it shows that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord Holt, in his celebrated judgment in *Coggs v. Bernard*, 2 Ld. Raym. at p. 916, that a pawnee "has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him," language certainly seeming to indicate an opinion that he has an interest in the thing, a real right, as distinguished from a mere personal right of detention. And Story, in his *Treatise on Bailments*, § 327, says: "But whatever doubt may be indulged as to the case of a factor, it has been decided," that is, in America, "that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

In *Whitaker on Lien*, published in 1812, p. 140, the law is laid down to be that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as showing that this was an existing opinion in England before Story wrote his treatise. But there is a class of cases in which a person having a limited interest in chattels, either as a hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all

these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest; so that it must be taken from his doing it that he had renounced the contract, which, as was said in *Fenn v. Brittleston*, 7 Ex. at p. 160, 21 L. J. Ex. at p. 43, operates as a disclaimer at common law; or as it is put by Williams, J., in *Johnson v. Stear*, 15 C. B. N. s. 330, 341, 33 L. J. C. P. 130, 134, he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being wholly at variance with the purpose for which he holds them, that it may well be said that he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case, and recover the damage which he actually sustained, which may in such cases be very trifling, though it may be large, instead of holding that he might bring trover, and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant to holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon. But where the act, though unauthorized, is not so repugnant to the contract as to show a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to ride from Gravesend to Nettledsted deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and, although he misbehaved by riding to another place than was intended, that was to be punishable by an action on the case, and not by seizing the gelding. *Lee v. Atkinson*, Yelv. 172. This certainly was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to show a renunciation of the contract with the owner of the horse. Now I think that the sub-pledging of goods, held in security for money, before the money is due, is

not in general so inconsistent with the contract as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the mean time the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a sub-pledge; at least, the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so long, at least, as it purports to transfer no more than the pledgee's interest against the pledgor) in so far from being found in practice to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Act, and is in the civil law (and according to *Mores v. Conham*, Owen, 123, in our law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of *Bloxam v. Sanders*, 4 B. & C. 941, and *Milgate v. Kebble*, 3 M. & G. at p. 108, are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor, who irregularly sells the goods which have only been partially paid for, is very analogous to that of a pledgee; and in *Milgate v. Kebble*, 3 M. & G. at 108, Tindal, C. J., is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.

But the latest case, and one which I think is binding on this court, is that of *Johnson v. Stear*, 15 C. B. N. s. 330, 33 L. J. C. P. at p. 180; and I think that the decision of the majority of the Court of Common Pleas in that case is an authority that at all events there remains in the pawnee an interest, not put an end to by the unauthorized transfer, such as is inconsistent with a right in the pawnor to recover in detinue. In that case the goods had been pledged as a security for a bill of exchange, with

a power of sale if the bill was not paid at maturity. The pledgee sold the goods the *day before* he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods without any reduction. Williams, J., thought that they were so entitled, giving, as his reason, "that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against the whole world." 15 C. B. N. s. at p. 341; 33 L. J. C. P. at p. 134. And if this was correct, the present plaintiff is entitled to judgment. But the majority of the court decided that "the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and a right of property in the goods which was *more* than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, *nor the interest* of the pawnee in the goods under that contract." 15 C. B. N. s. at pp. 334, 335; 33 L. J. C. P. at p. 131. This can be reconciled with the cases above cited, of which *Fenn v. Brittleston*, 7 Ex. 152, 21 L. J. Ex. 41, is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson v. Stear*. It may be that the conclusion from these premises ought to have been that the defendant was entitled to the verdict, on the plea of not possessed in trover, unless the court thought fit to let the plaintiff, on proper terms, amend by substituting a count for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from Williams, J., shows that after consideration they *meant* to decide that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of Williams, J., I think we must, in a court of co-ordinate jurisdiction, act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground. And, as already intimated, I think that, unless the plaintiff is entitled

to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.

MELLOR, J., read the judgment of

COCKBURN, C. J. The question in this case is, whether, when debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the depositor to sell or otherwise dispose of the debentures in the event of non-payment of the bill,—in other words, as a pledge,—and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and, without either paying or tendering the amount of the bill of exchange, for the payment of which the security had been pledged, bring an action of detinue to recover the thing pledged from the holder to whom it has been transferred.

I think it unnecessary to the decision in the present case to determine whether a party with whom an article has been pledged as a security for the payment of money has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged,—as in the case of a valuable work of art,—that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts

only to a breach of contract, upon which the owner may bring an action,—for nominal damages, if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time.

It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end, until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him.

The view which I have taken of this case, and which I should have arrived at independently of authority, is fully borne out by the decision of the majority of the Court of Common Pleas in the case of *Johnson v. Stear*. There goods, which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, the court held, on an action of trover being brought to recover the goods, that, although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee, so as to entitle the owner to bring an action to recover the goods as if the contract never had existed. This decision appears to me to be a direct authority on the present case, and to be binding upon us. It is true that Mr. Justice Williams dissented from the other three judges constituting the court, holding that the contract was put an end to, and the plaintiff remitted to his absolute right of ownership, by the conversion of the goods

by the pawnee. But, however I may regret to differ from that very learned judge, I concur, for the reasons I have given, with the majority of the Court of Common Pleas in holding that a pawnor cannot recover back goods (and the same principle obviously would apply to debentures) pledged as security for the payment of a debt or bill of exchange, until he has paid or tendered the amount of the debt.

I am therefore of opinion that our judgment should be in favor of the defendant.

Judgment for the defendant.

Historical. — By the ancient law of England there existed four different modes of redress for the loss of goods; by appeal of robbery (in which restitution as well as punishment for the felony was awarded, see note on Trespasses upon Property), by writ of replevin, by writ of trespass, and by writ of detinue. But these proceedings were not adequate for relief in all cases. The appeal of robbery availed only when goods had been feloniously taken; and the writ of replevin was applicable only in cases of distress. 3 Black. Com. 146.

The writ of trespass afforded a larger remedy; but this, too, fell short of giving redress in all cases. A case specially *apropos* to the subject of the present note will be found in the Year-Book of 7 Edw. 4, p. 3, pl. 9. In trespass for breaking the plaintiff's close and carrying away his goods, the defendant pleaded, as to the goods, that one R. S., long before the plaintiff had any thing in the said goods, was possessed of them as his own, and made the plaintiff and one Alice her executors, and after her death the said Alice took the goods of the testatrix and became sole possessed of them, and then made the defendant her executor, and after her death the defendant *found* the said goods among other goods of the said Alice and took them by favor

to keep for the benefit of the plaintiff, and so still detained them. And therefore he contended that the plaintiff ought to have brought a writ of detinue; and the court sustained the plea. Needham, one of the judges, said that the plea was a good justification to the action, since it was lawful for an executor to take into possession all goods found among those of his testator. "If," said he, "a man lose a thing in the road, and I come and *find* it there, and pledge it to keep to the use of him who lost it, and he brings an action of trespass against me, I shall plead this to the action; for it was lawful for me to take the thing to the use of him who lost it."

The writ of trespass was based upon a wrongful taking of the goods; and therefore it could not be maintained where the defendant had come into possession lawfully, notwithstanding his refusal to redeliver them.

Detinue supplied this defect to some extent. The first mention of this writ is in the Statute of Wales (*Statutum Walliæ*, 12 Edw. 1), the substance of which will be found in 2 Reeves's Hist. Eng. Law, 13-16, Finl. ed. Among other writs provided by this statute for the people of Wales were a writ of debt, and a writ of the same nature with the substitution of the word *detinet* for *debet*. This writ was thus: "Præ-

cipe A. quod juste sine delatione red-dat B. *unum saccum lanæ* pretii decem marcorum, quam si injuste *detinet*; et nisi fecerit," &c. Ib. p. 158.

The writ in effect was nothing else than a writ of debt for a chattel. The probability indeed is that at first there was no separate writ of detinue; the action of debt certainly having been used where detinue afterwards was brought. Glanvill, lib. 10, c. 3, 13; Bracton, 102 b, "conqueror quod talis mihi injuste *detinet*," &c.; Fleta, p. 120. The use of the word "*detinet*" in such cases would naturally suggest a distinguishing name for the writ when applied to chattels. And such a division of the writ would account for the more limited application given to debt in subsequent times.

The following are specimens of the (oral) declarations which were made upon writs of detinue: In the case of a bailment, the plaintiff said, "This sheweth you A., that B. wrongfully detains from him chattels to the value of £20, and therefore wrongfully, for that whereas the said A., on a certain day, year, and place, bailed to the aforesaid B. linen and woollen cloth, to keep till he demanded it, the said A., on such a day, year, and place, requested the said B. to return the aforesaid chattels, yet he was not willing yet to return them, nor yet will," &c.

For detaining, after divorce, certain goods given in frank-marriage, the plaintiff declared, "This sheweth you Ellen, who was the daughter of A., who is here, that N., who is there, wrongfully detains and will not return to her chattels to the value of £10, and therefore wrongfully, for that whereas the said A., on such a day, year, and place, gave the aforesaid N. chattels to the value of £10, namely (*scilicet*), corn

and grain, in frank-marriage with the said Ellen, the said N., after espousals solemnly had between them, came and procured one Alice to demand him as her husband by preconcert made between them; so that, at the suit of the said Alice, and by the procurement of the said N. a divorce was had between the aforesaid N. and Ellen on such a day, year, and place before the ordinary, &c., by reason of which divorce an action hath accrued to her to demand the aforesaid chattels given with her in frank-marriage in the form aforesaid; by reason of which the said Ellen hath often come to the said N. and requested him to return the aforesaid chattels, yet he has never been willing to return them," &c. Old Natura Brev. 40 b, 41; 2 Reeves's Hist. 379, Finl. ed.

Thus by means of a writ of detinue parties had a remedy for the detention of goods belonging to them which had lawfully come into the hands of the defendant, either by express bailment or by finding. 3 Black. Com. 152. Nor was it necessary that the owner had ever been in possession of them; and therefore, where a sealed bag full of muniments of title was bailed to A. to be delivered to B., the latter could bring detinue for its detention against the executor of A. 39 Edw. 3, p. 17. So, too, an heir was entitled to this writ for an heirloom of which he had not been in possession. 39 Edw. 3, p. 6.

But as the first object of detinue was to recover the specific chattels, if they could be found, it was essential (at least from the time of Edward 3) for the plaintiff to set out accurately in the writ the goods detained. 39 Edw. 3, p. 7, 8. For example, detinue of charters generally was bad; and it was either necessary to allege that the charters were contained in a box closed or

sealed, or the charters must have been specially mentioned by name and description. *Ib.* And in the latter case the plaintiff lost the right to a *capias* to which he might have resorted upon a return of *nil* in the former. 42 Edw. 3, p. 13; 40 Edw. 3, p. 25.

There was another objection to the writ of detinue. The writ was, as has been said, closely allied to debt; and the defendant, as in debt, was entitled to wage his law (that is, to exculpate himself by oath) on account of the trust and confidence which had been reposed in him, which it was not to be supposed he would violate. 3 Black. Com. 152. This, however, was not true of charters specially named and described. 2 Reeves's Hist. 384, Finl. ed.

Where, then, the plaintiff could not clearly identify the goods in his declaration, and where, though he could so identify them, he was unwilling to give the defendant the advantage of law wager, something else was necessary.

As we have seen in other notes, a statute was passed in the 13th year of Edward the First (St. Westm. 2, ch. 24) which authorized the clerks in chancery to frame writs in similar cases (*in consimili casu*) to those already in existence, to meet special cases for which the existing writs were inadequate; thus allowing the party to sue upon his own special case.

The first mention of a special right of action for goods lost and found (as the original has been translated) occurs some nine years after the passage of this act. 22 Edw. 1, p. 466, where we

find the reporter, as translated, saying,¹ "Note, that where a thing belonging to a man is lost [*endire*], he may count that he (the finder) tortiously detains it, &c., and tortiously for this, that whereas he lost [*endire*] the said thing on such a day, &c., he (the loser) [came] on such a day, &c., and found it in the house of such an one and told him, &c., and prayed him to restore the thing, but that he would not restore it, &c., to his damage, &c.; and if he will, &c. In this case the demandant must prove by his law (his own hand the twelfth) that he lost [*endire*] the thing," "*en ceo cas yl covent kel demande preve ke la chose yl fut endire, ow sa dusse mayn.*" (The translation is Mr. Horwood's.)

This, it will be observed, is not exactly the allegation afterwards made in the action of trover, where the statement is that the *plaintiff* lost and the *defendant* found the chattel; the allegation, *supra*, being that the *plaintiff* found as well as lost.

The form of the allegation suggests some resemblance to the proceeding for the Vindication of Movables (that is, for the recovery of goods lost or stolen) in the Salic law. See *La Procédure de la Lex Salica*, par R. Sohm; an outline of which work will be found in the *North American Review* for April, 1874, pp. 416-425. The Salic proceeding, however, was for the recovery of the specific goods, somewhat in this respect like the appeal of robbery.²

The above form of declaration would apply both to goods found by the defendant and to goods stolen by him;

¹ There is nothing to show whether this note was or was not of the year of the cases reported, but it could hardly have been before.

² In the Salic proceeding, when a man's goods were missing he summoned his neighbors (somewhat as in the early English and Norman hue-and-cry) to follow with him the tracks of the supposed thief, and when he came upon the property in the search — which could be made anywhere — he was to put his hand upon it (*mittat manum super eum*), and the one in possession of it was then required either to give it up or to contest the right in court. Sohm's *Procedure*, 41-45.

but it does not appear to have been adopted in any of the reported cases. Indeed, there is a long *hiatus* now between the reporter's statement, *supra*, and the first reported case of an action (not in detinue) for the loss of goods which had lawfully come to the hands of the defendant. We have been unable to find any cases of the kind until in the reign of Edward the Fourth; detinue being the remedy always pursued until this time. In this reign several cases of the kind occur; all being called actions on the case. Thus, it was held that an action on the case lay against a bailiff for wasting the goods of the owner, though he had not received them directly from him: 12 Edw. 4, p. 13; also that such an action lay against one who had hired a horse to ride to Everwike, and had ridden it to Carlisle: 21 Edw. 4, p. 76; also that it lay against one who had hired a horse to ride to Everwike, and had ridden it so fast that it could not be used for many days after; also that it lay against one who had killed a horse which had been bailed to him. (The last two cases are given in the Table (Index); but the references are incorrect.)

All of the above cases, it will be seen, are what have since been or might be called actions of trover; but the peculiar form of the declaration in trover, by which that action received its name, does not appear in cases reported until some sixty years later; until, in fact, the plaintiff's actual case was that of goods lost by him and found by the defendant. Such a case having occurred, the plaintiff availed himself of the advantage afforded in stating his own special case, instead of bringing detinue; and *this* form of action then came to be called trover.

The following cases appear in the

reigns of Henry the Eighth and Edward the Sixth. Action upon the case for that the defendant found the goods of the plaintiff, and delivered them to persons unknown; and it was held no plea that he did not deliver them in manner and form, without saying "not guilty," where the thing rests in doing. And the report goes on to say that if the action were, that whereas the plaintiff was possessed, &c., as of his own proper goods, and the defendant found them and converted them to his own use, it was no plea that the plaintiff was not possessed as of his own proper goods, but he should say "not guilty" to the misdemeanor, and give it in evidence that they were not the goods of the plaintiff. Brooke's New Cases, 62, pl. 198; 83 Hen. 8, B. The first plea in this case (non-delivery) suggests that counsel still supposed this action to be closely allied to detinue, where the common plea was *ne bailla pas*, or (when the plaintiff did not declare for a specialty) *navoit pas de son baille*. 3 Edw. 2, p. 78.

In another action on the case, of the next year, it was alleged that the goods of the plaintiff came to the hands of the defendant and he wasted them; to which the defendant pleaded that they did not come to his hands. This was held a good plea, and the defendant gave in evidence that they were not the proper goods of the plaintiff. Brooke's N. C. 73, pl. 231; 34 Hen. 8, B.

In the 4th year of Edward 6 the plaintiff declared in an action on the case that whereas he was possessed of such goods, as of his own proper goods, and lost them, and the defendant found them and converted them to his own use. The defendant pleaded that the plaintiff pledged them to him for 10*l.*, by reason of which he detained them

for the said 10 $\frac{1}{2}$., as it was lawful for him, without this, that he converted them to his own use; which was held a good plea. But others said that he must plead "not guilty," and give this matter in evidence for the detainer. Brooke's N. C. 122, pl. 404.

This form of declaring, that the plaintiff lost and the defendant found the goods, came in the course of time to be allowed (equally with detinue, and where detinue would not lie) in all cases of conversion; the allegation of the loss and finding being now considered as a fiction, and not traversable, and the conversion the substance of the action. 3 Black. Com. 153; Stranham's Case, 1 Croke, Eliz. 98. The newer action grew more and more in favor; and thus in the progress of trover came the decline of detinue.

But the profession seem to have forgotten or neglected the cases of the time of Edward 4, if not later ones; and the practice of inserting the useless fiction of trover prevailed until comparatively recent times. We have now, however, reached the sensible method of the profession in the fifteenth century.

In the old writs of detinue, as in other writs generally, the time and place of the tort was always alleged. In the reign of Elizabeth it came to be questioned by counsel whether the allegation were necessary. In Hubbard's Case, 1 Cro. Eliz. 78, it was moved in arrest of judgment in trover that the plaintiff had not alleged the place of the conversion; and the bill was abated. So, too, it was said in Stranham's Case, ib. 98, that it had been adjudged in Leake's Case that the time and place were to be alleged, for they were material; and this decision was now followed, and the bill abated after verdict.

But this doctrine was a few years

afterwards overruled, after much discussion by the judges. Rutland v. Rutland, ib. 377. This was an action by an executor for a conversion of the goods of the testator; and the doubt was whether the time of the conversion should not be alleged so as to show if the action came within the equity of the St. 4, Edw. 3, c. 7, allowing actions for goods converted *in the time of the testator*, or was brought at common law. "It is doubtful," said two of the judges, "in whose right it is brought for want of the time certainly expressed." However, upon the production of a decision against the necessity of the allegation in such a case, judgment was given for the plaintiff. This case was followed in the next reign (Wilson v. Chambers, Cro. Car. 262), and became settled law.

There was also considerable discussion in the cases of trover about this time as to whether a refusal to deliver the goods upon request was a conversion. In East v. Newman, Gouldsb. 152 (*temp. Eliz.*), the judges thought it was; but in the case of The Chancellor, 10 Coke, 53 b, 56 b, Lord Coke laid down the rule as it now prevails, that the refusal is only *evidence* of conversion. (This point is considered *infra*.) We turn now to the existing law.

Possession and Property. — It is well settled that it is essential to a right of action in trover that the plaintiff should have, as against the *defendant*, either the possession or the right of possession of the chattel. Gordon v. Harper, 7 T. R. 9; Owen v. Knight, 4 Bing. N. C. 54; Pyne v. Dor, 1 T. R. 55; Bradley v. Copley, 1 Com. B. 685; Winship v. Neale, 10 Gray, 382. It was accordingly held in Gordon v. Harper, that a landlord could not, during the term, maintain trover against a

sheriff who had wrongfully levied upon the goods of his tenant, since he had not possession or the right of possession. Other cases of the same character are considered *infra*, under What constitutes Conversion.

It is sometimes said that this action requires a right of property also in the plaintiff. Thus, in *Cooper v. Chitty*, 1 Burr. 20, 31, Lord Mansfield says that one of the things "necessary to be proved to entitle the plaintiff to recover in this kind of action is property in the plaintiff." And in *Owen v. Knight*, 4 Bing. N. C. 54, 57, Tindal, C. J., says, "The action of trover only lies where the plaintiff has the right to possession as well as a legal property in the subject of the suit." But these and the like statements in the books are made in cases where the plaintiff had in fact property in the chattel; and they generally mean only that in such cases the plaintiff must also have the right of possession of the goods. But see *Tuthill v. Wheeler*, 6 Barb. 362.

And when it is said that the plaintiff must have an absolute or *special* property in the goods (1 Chitty, Pleading, 148, 149), the latter term is used to denote the possession either of one who has a qualified interest, or of one who has only the bare possession, since this of itself gives him a right to the property as to all persons except the owner. 1 Chitty, 151, 169.

That possession is sufficient for the plaintiff appears from the principal case, *Armory v. Delamirie*, which decides that the finder of a chattel may maintain trover against any one except the owner who deprives him of his possession. And the same appears from *Nicolls v. Bastard*, 2 Crompt., M. & R. 659, which holds that a mere gratuitous bailee may sue in trover for a wrongful

dispossession of the goods by a stranger. Indeed, it is a general doctrine by the weight of authority that any possession, even that of a wrong-doer, is sufficient for the plaintiff as against every one but the rightful owner, entitled to possession. *Jefferies v. Great Western Ry. Co.*, 5 El. & B. 802; *Wilbraham v. Snow*, 2 Wms. Saund. 47 f; *Northam v. Bowden*, 11 Ex. 70; *Buckley v. Gross*, 3 Best. & S. 566; *Hubbard v. Lyman*, 8 Allen, 520; *Shaw v. Kaler*, 106 Mass. 448. But see cases cited, 1 Smith's L. C. 479, 480 (5th Am. ed.). *A fortiori*, it is a conversion to take property out of the possession of the owner without authority, though it be delivered to one with whom the owner is negotiating for its purchase. *Coughlin v. Ball*, 4 Allen, 834.

And trover may also be maintained sometimes against one who has not taken possession of the goods; as where a horse is let to A. and delivered by the owner to B. upon the credit of A., and B. drives the horse to death by the consent and aid of A. driving another horse near by. *Banfield v. Whipple*, 10 Allen, 27. See *McPartland v. Read*, 11 Allen, 231. And the fact that he took possession as agent of another is not material. *Edgerly v. Whalan*, 106 Mass. 307.

A party rightfully in possession may also in some cases maintain trover against the owner. In *Roberts v. Wyatt*, 2 Taunt. 268, it was held that the plaintiff, who was entitled to the temporary possession and property of a written abstract of title, and had delivered it back to the owner for a particular purpose, could maintain trover for it after that purpose was satisfied and during the continuance of the plaintiff's temporary right. But in such cases the damages, it would seem,

must be confined to the value of the plaintiff's interest.

And in an action against a stranger by one having merely the possession of goods, with no right of possession against the owner, the defendant, according to the better opinion, cannot even set up the right of the owner (the *jus tertii*) as a defence; unless it be done under his authority or under a claim already asserted against the defendant by him. *Jefferies v. Great Western Ry. Co.*, 5 El. & B. 802. See *Thorne v. Tilbury*, 3 Hurl. & N. 534; *Biddle v. Bond*, 34 Law J. C. B. 137; *Cheesman v. Exall*, 6 Ex. 341, in which the right to set up the *jus tertii* arose between bailor and bailee. But see *Rotan v. Fletcher*, 15 Johns. 207; *Sylvester v. Girard*, 4 Rawle, 185; *Grubb v. Guilford*, 4 Watts, 223; and cases cited in 1 Smith's L. C. 479, 480 (5th Am. ed.).

In *Jefferies v. Great Western Ry. Co.* the defendants, having dispossessed the plaintiff of goods which had been in his possession for some time, set up, in an action for conversion, the ownership of a third person; but without themselves asserting any claim under him. "I am of opinion," said Lord Campbell, C. J., "that the law is, that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrong-doer, and cannot defend himself by showing that there was title in some third person; for against a wrong-doer possession is a title."

The principle is, that the defendant must show in himself a better title than the plaintiff has. *Hubbard v. Lyman*, 8 Allen, 520; *Burke v. Savage*, 13 Allen, 408; *Landon v. Emmons*, 97 Mass. 37.

And it is just that the wrong-doer should recover of one who has disturbed his possession without right, since the wrong-doer is himself liable to the owner; and he should have recourse to the defendant, for whose act he is responsible, for a fund with which to meet that liability. See *Cutts v. Spring*, *ante*, p. 341.

Whether the place in which goods are found has any bearing upon the finder's right of possession has been under consideration in several cases. In *Mathews v. Harsell*, 1 E. D. Smith, 393, a servant had found certain notes in her master's house, and with her master's consent was held entitled to maintain trover against a wrong-doer for converting them. But the question was left open whether she could have claimed the notes against her master, the court, however, inclining to think that she could not.

In *Bridges v. Hawkesworth*, 21 Law J. Q. B. 75, s. c. 15 Jur. 1079, 7 Eng. Law & Eq. 424, the plaintiff, while in the defendant's shop on business, having picked up from the floor of the shop a parcel containing bank-notes, handed them to the defendant to keep till the owner should claim them. They were advertised by the defendant; but no one appearing to claim them, and three years having elapsed, the plaintiff requested the defendant to return them, tendering the costs of the advertisements and offering an indemnity. Upon the defendant's refusal, an action was brought for conversion; and the plaintiff was held entitled to recover. *Patteson, J.*, in delivering judgment, said: "It was well asked on the argument, If the defendant has the right, when did it accrue to him? If at all, it must have been antecedent to the finding by the plaintiff, for

that finding could not give the defendant any right. If the notes had been accidentally kicked into the street, and there found by some one passing by, could it be contended that the defendant was entitled to them from the mere fact of their being originally dropped in his shop? If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house? Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement. These steps were really taken by the defendant as the agent of the plaintiff; and he has been offered an indemnity, the sufficiency of which is not disputed. We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner; and we think that the rule must prevail, and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference."

In Massachusetts, while the doctrine of *Bridges v. Hawkesworth* is approved, a distinction has been taken between such a case (where the chattel was found on the floor of the store) and the case of things found upon a table or counter of the shop. *McAvoy v. Medina*, 11 Allen, 548.

In the case referred to the plaintiff saw, lying upon a table in a barber

shop, a pocket-book, containing money, which had been accidentally left there by another, took it up, called the attention of the proprietor to it, and then handed it to him, telling him to keep it, and, if the owner should come, to give it to him; otherwise to advertise it, which the defendant promised to do. No one having called for the money, the plaintiff claimed it, but the defendant refused to give it to him; and the court sustained him. "This property," said the court, "is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there, and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop; but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it." The case was said to resemble *Lawrence v. State*, 1 Humph. 228, which was an indictment for the larceny of goods found under similar circumstances; the court holding that to place a pocket-book upon a table and to forget to take it away was not to lose it, in the sense in which the authorities referred to speak of lost property. See also, as to larceny of goods found, *Merry v. Green*, 7 Mees. & W. 623; *Regina v. Peters*, 1 Car. & K. 245; *Regina v. Mole*, ib. 417; *Cartwright v. Green*, 8 Ves. 405; *Florence Sewing Co. v. Warford*, 1 Sweeney, 433.

In other cases, as between the finder

and one who claims the chattel as owner, it is clear that the former may retain the article a reasonable length of time for the purpose of satisfying himself whether the claimant be in fact the owner. *Isaack v. Clarke*, 1 Rolle, 130; *Clark v. Chamberlain*, 2 Mees. & W. 78.

See also, upon the rights of a finder, *Symmes v. Frazier*, 6 Mass. 344; *Wentworth v. Day*, 3 Met. 352; *Kincaid v. Eaton*, 98 Mass. 139; *Haslem v. Lockwood*, 37 Conn. 500; *McLaughlin v. Waite*, 9 Cow. 670; s. c. 5 Wend. 404. It is to be observed of the last case that the head-note in 9 Cowen is misleading. The point decided is more correctly given in 5 Wendell, where the judgment was affirmed.

What constitutes Conversion. (a.) Assertion of Title. — It may be laid down as a general principle that the assertion of a title to or an act of dominion over personal property, inconsistent with the right of the owner, is a conversion, and renders the wrong-doer liable to an action of trover.

To assert a title to the property of another is a clear case of conversion; but what amounts to an *act* of dominion is not in every case so easily determined. It is obvious, however, that the act must be equivalent in character to an assertion of title. An examination of the cases will serve to define the idea.

There are two classes of acts of dominion: first, where the defendant appropriates to himself the goods of the plaintiff; secondly, where he intentionally deprives the plaintiff of their use without appropriating them to himself. *Simmons v. Lillystone*, 8 Ex. 431; *McPartland v. Read*, 11 Allen, 231.

(b.) *Sale.* — The most common illus-

tration of an act of dominion of the first class is the case of a sale of the chattel, made without authority of the owner. Every sale without restriction implies an assertion of title; and, if the party have no title or authority to sell, the act renders him liable to the true owner to an action for conversion. *Gilman v. Hill*, 36 N. H. 311; *Clark v. Whitaker*, 19 Conn. 319; *Webber v. Davis*, 44 Maine, 147; *Harris v. Saunders*, 2 Strobh. Eq. 370, note. This is equally true of a wrongful sale of property by an officer: *Cooper v. Chitty*, 1 Burr. 20; *Grainger v. Hill*, 4 Bing. N. C. 221; and so of an excessive sale. *Aldred v. Constable*, 6 Q. B. 381. See also *Lancashire Waggon Co. v. Fitzhugh*, 6 Hurl. & N. 502. So of the party at whose instance the officer makes the wrongful sale. *Billiter v. Young*, 7 El. & B. 1. And the purchaser is also guilty of conversion, if he takes a delivery of the property and claims it under the sale: *Hyde v. Noble*, 13 N. H. 494; *Clark v. Rideout*, 39 N. H. 238; *Clark v. Wilson*, 103 Mass. 219; whether such purchaser refuse to restore the goods, or before a demand sell the property. *Harris v. Saunders*, *supra*; *Carter v. Kingman*, 103 Mass. 517.

And this principle, that the sale of property is an act of dominion so as to render the vendor liable for conversion when he had no right to sell, applies equally whether the vendor knew or did not know the true state of the title. In *Harris v. Saunders* an action of trover was brought for a slave whom the defendant had bought from one who had no title, and had then sold him to one who had carried the slave beyond the reach of the plaintiff, the owner. The defence was that both the purchase and sale had been made *bona fide*, without a knowledge of the plaintiff's title; but

the plaintiff was held entitled to recover. "The argument is," said the court, "that inasmuch as the defendant was not aware of the plaintiff's title, he is not liable after the sale. It is not denied that he would be liable if he had retained the property and refused to give it up. Can the sale make any difference, when he thereby made property of him, and has the proceeds in his pocket? The sale was an act by which the plaintiff is wholly deprived of his property; and it was not the less his property because the defendant was not aware of his title and purchased of another." And *Cooper v. Chitty*, 1 Burr. 20, was cited as authority for the position.

In *McCombie v. Davies*, 6 East, 538, referred to in the principal case, *Bristol v. Burt*, the property of the plaintiff had been taken by the defendant in assignment by way of pledge from a broker who had purchased it (while lying in the king's warehouse) in his own name for the plaintiff; and the defendant refused to give an order for its delivery to the plaintiff, until he had been paid the money advanced to the broker, on the ground of his ignorance of the plaintiff's title when he took the assignment. At the trial at *nisi prius* Lord Ellenborough had nonsuited the plaintiff, on the supposition that the mere refusal to give a delivery order was not a conversion; not conceiving that the not doing of an act could make a party liable in trover. But the nonsuit was set aside, Lord Ellenborough now resting the case upon the broad principle that the assuming the property in and right of disposing of another man's goods was a conversion. "And certainly," said he, "a man is guilty of a conversion who takes my property by assignment from another

who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?"

See also *Buckmaster v. Mower*, 21 Vt. 204; *Crocker v. Gullifer*, 44 Maine, 491; *Sargent v. Gile*, 8 N. H. 325; *Bailey v. Colby*, 34 N. H. 29; *Williams v. Merle*, 11 Wend. 80; *Coffey v. Wilkerson*, 1 Met. (Ky.) 101; *Carter v. Kingman*, 103 Mass. 517.

Fraud, however, only renders a contract voidable, at the election of the injured party; and if the defrauded vendor of goods do not elect to disaffirm the sale before the rights of third persons have *bona fide* intervened, he cannot maintain trover; that is, the vendor cannot claim the goods from subsequent *bona fide* purchasers. *White v. Garden*, 10 Com. B. 927.

(c.) *Disposal of Qualified Interest.*—A person who has an assignable interest in a chattel may dispose of it to another without being guilty of a conversion, though no permission was granted by the party under whom he holds; unless, indeed, he exercise a right of absolute ownership over the property. *Bailey v. Colby*, 34 N. H. 29. See *Everett v. Salters*, 15 Wend. 474; s. c. 20 Wend. 267; *Holbrook v. Wight*, 24 Wend. 169.

But not every interest is assignable. For example, in many cases of bailment the objects to be effected by that relation forbid that the bailee should have an assignable interest. Such is the case where the bailment is made upon a personal trust in the character of the bailee. Such is the case, too, where the bailee has a mere lien, as was said in the principal case, *Donald v. Suckling*; and such is the case, as we have seen, where the bailment is at will. In such cases an attempt by the bailee to

assign any interest in the property if he transfer his possession, puts an end to the bailment, *ipso facto*. The assignee consequently acquires no title, and becomes himself liable for conversion in case of his refusal to deliver the goods to the rightful owner. *Bailey v. Colby, supra*.

There is, however, a large class of bailments where the trust is accompanied with other incidents than those pertaining to a simple bailment, and where there is no element of personal trust and confidence, and none of the characteristics of an estate at will; and in this class it is consistent to hold that the bailee has assignable interest. Such are cases of pledge or pawn, and the like. *Bailey v. Colby, supra*. There can be no conversion in assigning an interest of this kind, if the assignee merely claims to stand in the situation of the assignor, because the latter, having exercised no right of dominion over the property, but having dealt only with his own interest, has not divested himself of his right of possession; and while the right of possession is in another, the owner cannot maintain trover.

These are clear cases; but supposing, in the case of a bailment, the bailee have an assignable interest, and attempt to sell the absolute property in the chattel, what is the effect? If the party be strictly a bailee (other than a pledgee, as to which see *infra*), it would seem, from the principles above stated, that the act must always amount to a conversion. The act would be an assertion of dominion not pertaining to the bailee; and this would defeat his right of possession and let in the rights of the bailor. But if, on the other hand, the party be something more than a bailee and have the legal title to the goods, though subject to defeat by the per-

formance of a condition subsequent by the party from whom he derives title (as in the case of a sale with liberty to repurchase), his alienation of it will not be a conversion.

It is difficult, however, to state just where the line is. In *Vincent v. Cornell*, 13 Pick. 294, the plaintiff exchanged oxen in February with W. C., under an agreement that in May he should pay the plaintiff a certain sum of money, the difference in value in favor of the plaintiff's oxen, by a certain day; and a written agreement was made, in order to secure the plaintiff, in which it was acknowledged that W. C. had received the oxen "principally to keep for the plaintiff" till May, when they were to be returned; or, if the money should be paid when due, the plaintiff was to release his right to the oxen. Before payment became due W. C. sold them to the defendant, and the defendant sold them to T.; whereupon, after the money became due, the plaintiff brought trover. The court held the action not maintainable. The agreement between W. C. and the plaintiff, it was said, amounted to a conditional sale; and W. C. had therefore a clear right to dispose of the possession with his right, such as it was, to the defendant. The plaintiff at that time had no possession or right of possession; and the taking by the defendant was not tortious.

But this case has not been deemed satisfactory. In *Sargent v. Gile*, 8 N. H. 325, it appeared that the plaintiffs had delivered furniture to one Wilson upon an agreement that he should keep it six months, and, if within that time he should pay for it, he was to have it at cost; otherwise he was to pay twenty-five per cent for its use. Two or three days after receiving the furniture Wilson sold it to the defendants, who had

no notice of the agreement mentioned; and this was held a conversion.

Mr. Justice Parker, speaking for the court, doubted the above case of *Vincent v. Cornell*, and referred to *Sanborn v. Colman*, 6 N. H. 14, where the plaintiff, being owner of a mare, had let her for hire to one Brown for four weeks, who during the first week sold her to the defendant; in which case trover was held proper. The learned justice held that the fact that Wilson had a right to pay for the furniture within the six months did not change the nature of the case. Wilson "was a bailee for hire for a certain time," said the learned judge, "with a right to purchase, if within that time he paid the price. This he had not done when he sold; and the contract by which he gained the right to purchase conferred on him no right to sell, nor in any manner enlarged his right as bailee. The goods still remained the property of the plaintiffs. When, therefore, he undertook to sell, and delivered the goods to others, in violation of any right which he then had, or, for aught which appeared, ever would have, he forfeited the right to hold and use, and waived all benefit of it, having voluntarily deprived himself of that right; and the defendants could gain no right of possession, because Wilson had no power to communicate any such right to them."

To the same effect are *Whipple v. Kilpatrick*, 19 Maine, 427; *Crocker v. Gullifer*, 44 Maine, 491; *Hill v. Freeman*, 3 Cush. 257; *Coggill v. Hartford & N. H. R. Co.*, 3 Gray, 547; *Sargent v. Metcalf*, 5 Gray, 306; *Burbank v. Crocker*, 7 Gray, 158; *Deshon v. Bigelow*, 8 Gray, 159, clearly establishing the rule that the title does not pass in a conditional sale. And see *Moss v. Sweet*, 16 Q. B. 493, in which it is held

that upon a bargain to "sell or return," the property does pass, after a reasonable length of time has elapsed sufficient to show an intention to retain the property. See also *Meldrum v. Snow*, 9 Pick. 441; *Eldridge v. Benson*, 7 Cush. 483; *Blood v. Palmer*, 2 Fairf. 414; *Neate v. Ball*, 2 East, 117.

As to *Pain v. Whittaker*, Ryan & M. 99, referred to as authority in *Vincent v. Cornell*, the fact is pointed out by the New Hampshire court that no wrongful act had been done by the party holding the qualified interest, a bailee. The case was trover for a piano, which had been let by the plaintiffs to one Evans at a monthly rent. During the term it was seized by the defendants, sheriffs, on execution, and sold, against the protest of the plaintiffs. The right of action was properly denied; for the sheriffs could sell no more than the interest of Evans, and it did not appear that Evans had participated and attempted to dispose of the absolute property in the instrument. And even if Evans had been guilty of such an act, it is difficult to see how it could have affected the sheriffs; though the purchasers would doubtless have been liable in trover.

Pain v. Whittaker was decided upon the authority of *Gordon v. Harper*, 7 T. R. 9, a similar case. In that case the seizure of the goods by the defendant was itself wrongful; the execution being levied upon the plaintiff's goods, held under lease by B., as the property of another. But it was held that trover could not be maintained. "The true question is," said Lord Kenyon, "whether, when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary

interest, he can, notwithstanding, recover the value of the whole property, pending the existence of the term, in an action of trover. The very statement of the proposition affords an answer to it. . . . The cases which have been put at the bar do not apply. The one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing; and by the very act of felling it his right is absolutely determined. And even then the property does not vest in his immediate landlord; for if he has only an estate for life it will go over to the owner of the inheritance. Here, however, the tenant's right of possession during the term cannot be divested by any wrongful act; nor can it thereby be revested in the landlord."

Mr. Justice Grose said that the common form of pleading was decisive of the case; for the plaintiff declares that, *being possessed*, he lost the goods, and he is bound to show either an actual or a virtual possession, which the plaintiff here could not do. And this observation was said by Mr. Justice Lawrence to be very material.

It seems clear, therefore, that this class of cases does not support the doctrine of the court in *Vincent v. Cornell*; the tenant or bailee having himself done no wrongful act by which he loses his right of possession.

The question in cases like *Vincent v. Cornell*, it is to be observed, is entirely one of title; and it matters not, if the title has passed from the plaintiff to the alleged bailee, that the latter renders

himself liable to an action for breach of contract in making the sale. For example: in the case of a sale upon an agreement that the vendor may repurchase, within a certain time, the title having passed, the party may resell within the time; and neither he nor the purchaser will be liable for conversion, though the original owner duly tender the price of the goods under the agreement for the repurchase. See *Hills v. Snell*, 104 Mass. 173, 177. Clearly, where the owner has given to another, or permitted him to have, control of property, the latter cannot be held responsible for its conversion if he merely makes such use of it, or exercises such dominion over it, as is warranted by the authority thus given. *Ib*; *Strickland v. Barrett*, 20 Pick. 415; *Burbank v. Crooker*, 7 Gray, 158.

In a recent English case an attempt was made to establish a distinction in this particular in favor of an unpaid vendor retaining the custody of the goods. The case was an action for the alleged conversion of certain sheep which the plaintiff had bought of the defendant on credit, leaving them in the custody of the vendor. Before any default on the part of the plaintiff, the defendant resold the sheep; and it was held that this was a conversion. The court were all of opinion that the attempted distinction was not sustainable. "It appears to us," said Bramwell, B., "that where there has been no default on the part of the vendee, if the vendor is guilty of an act of conversion of the goods sold, the vendee is entitled to maintain an action against him for that conversion, and that he has such a right of property and possession as is necessary to entitle a party to maintain such action. In this case the sheep remained in the pos-

session of the vendor, not *qua* vendor, but as the agent of the vendee, the plaintiff, and for his benefit." *Chinery v. Viall*, 5 Hurl. & N. 288.

The court referred to a much stronger case, *Martindale v. Smith*, 1 Q. B. 389, as showing that if a day for payment had been named, and the plaintiff had not paid upon that day, but had afterwards and before the conversion tendered the money, the action would have been maintainable.

Whether the court in *Chinery v. Viall* supposed that there might in some cases be a conversion without a right of action in trover is not quite clear; though this seems to be the effect of the decision in *Milgate v. Kebble*, 3 Man. & G. 100, — a case which Mr. Baron Bramwell distinguished, and apparently disapproved.

Milgate v. Kebble was an action of trover for the alleged conversion of one hundred bushels of apples. It appeared on the trial that the defendant, on the 11th of September, 1839, had sold all his fruit to the plaintiff for £38; the latter to pay £10 on the following Monday, £10 on the next Monday, and the remainder before he took away any of the property. The plaintiff, having paid £33, gathered the apples on the 1st of October, and placed them under lock and key upon the defendant's premises in a kiln, within an out-house, the defendant retaining the key to the latter, but giving the plaintiff the key to the kiln. On the 27th of December the defendant gave the plaintiff notice to pay for the apples and take them away; but not having done so, the defendant, about a month afterwards, sold the property. Though the jury had found that a reasonable length of time had not elapsed after the notice and before the sale, it was held that the action could not be

maintained, on the ground of a want of possession in the plaintiff. The fact that the defendant had a key to the outer enclosure was deemed unimportant by Tindal, C. J.

It was not denied that there had been a conversion. In the course of the argument, Talfourd, for the plaintiff, observed that the court could not say that the defendant had a right to enter the kiln, — that is, that he still had the control and disposition of the apples; to which Erskine, J., assenting, said that if the defendant could enter, there would be no conversion; thus admitting that there had been a conversion. But the pleadings and judgment settle the point, at all events. There were two pleas, one of not guilty, and the other that the plaintiff was not possessed; and, instead of ordering a nonsuit, Talfourd prayed that the verdict might be entered *for the plaintiff on the first issue*, and for the defendant on the second, and it was so directed.

This case was decided upon the authority of *Bloxam v. Sanders*, 4 Barn. & C. 941, which is often cited. In that case, the defendants, hop-merchants, had, on several days in August, sold to one Saxby, of whom the plaintiffs were assignees in bankruptcy, various parcels of hops. Part of them were weighed, and an account of the weights, together with samples, delivered to Saxby. The usual time of payment in the trade was the second Saturday after the purchase. Saxby did not pay for the hops at the usual time, whereupon the defendants gave notice that unless they were paid for by a certain day they would be resold. The hops were not paid for; and the defendants resold part of them with the assent of Saxby, and after Saxby's bankruptcy sold the rest without his assent or that of his assignees. The de-

defendants, having made demand for the hops, brought trover; but it was held that they could not recover, on the ground that they had no right of possession.

The court said that in such cases the seller had a lien upon the goods, and, consequently, a right of possession; and, therefore, that the buyer, having no right of possession, could not maintain trover. This would also imply that trover cannot always be brought for an act of conversion.

But it is to be observed of this case that there was, in fact, no conversion or act of dominion in the transaction; for there was a usage of the trade that the goods should be paid for within a certain time, and Saxby had made default. And, though the jury had found that the defendants had not rescinded the sale, they had a right to rescind, which Saxby had recognized by his assent to the first sale, and which they had merely again availed themselves of (despite the unintelligible verdict of the jury) after the bankruptcy. And the default of the purchaser was one of the grounds taken in *Chinery v. Viall* for distinguishing *Milgate v. Keble*. In *Wilmshurst v. Bowker*, 5 Bing. N. C. 541, s. c. 7 Scott, 561, also, the plaintiffs were in default.

There is, perhaps, no express decision, made upon argument, that an act of conversion does not in all cases give rise to a right of action in trover; but the implied doctrine of the above cases renders the point worthy of further examination.

It has, indeed, been held in several recent English cases, contrary to the opinion which previously prevailed, that the sale of a pledge by the pledgee, or a repledge of the security for a larger sum than that of the original debt, be-

fore the maturity of that debt, would not enable the pledgor to maintain detinue or trover. *Donald v. Suckling*, principal case, *supra*, p. 394; *Halliday v. Holgate*, Law R. 3 Ex. 299, in Ex. Ch. See also *Johnson v. Stear*, 15 Comb. B. N. s. 330; *Baltimore Ins. Co. v. Dalrymple*, 25 Md. 269; *Bulkeley v. Welch*, 31 Conn. 339. *Contra*, *Story*, Bailments, §§ 303, 308, 327; *Clark v. Gilbert*, 2 Bing. N. C. 343, 357; *Chinery v. Viall*, 5 Hurl. & N. 288, 293; *Bailey v. Colby*, 34 N. H. 29, 35. But the statements in these latter cases are merely *dicta*.

In *Halliday v. Holgate* it was held in the Exchequer Chamber that not even nominal damages could be recovered in trover in such cases, on the ground that the act of sale had not revested in the pledgor the right of possession; and this was the ruling in the principal case, *Donald v. Suckling*. A pledge, it was said in both of these cases, was something more than a mere lien; and a sale by a pledgee would not annihilate the contract, as it would where the seller had only a lien upon the goods in his possession. In *Donald v. Suckling*, it will be observed that Cockburn, C. J., said: "We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as *his own* if the debt be not paid and the thing redeemed at the appointed time."

That is, the pawnee may treat the pledge as his own until the pawnor offers

to redeem it ; and, if he never offers to do so, there will be no conversion, though there was a sale or repledge of the goods before the debt became due. So Willes, J., delivering the judgment in *Halliday v. Holgate*, said that in the case of a pledge the right of property vested in the pledgee so far as was necessary to secure the debt. "It is true," he continued, "the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has *the whole interest*."

It is clear, therefore, that these cases are no authority for the position that there may be a conversion without a right of action in trover; for the courts held that the defendants had not been guilty of conversion.

Upon principle it is difficult to understand how there can be a conversion in such cases without this right of action. The fallacy on this point consists in an incorrect apprehension of the term "right of possession." In *Milgate v. Kebble*, *supra*, Erskine, J., says: "Under a plea of 'not possessed' in trover, the plaintiff must prove actual possession, or a right of immediate possession. Here it is conceded that there was no right of immediate possession."

This overlooks the situation of the parties and the nature of the act of dominion. One who takes possession of goods under a qualified right agrees to hold them in conformity to that right, whether he be a pledgee, an unpaid vendor, or a simple bailee without interest. It is equally clear that if he renounce his possession the owner may retake his goods, if he can do so without a breach of the peace; in other words, by a renunciation the party loses,

and the owner regains, his right of possession, — not the actual possession, for that is not necessary, but the *right of possession*, which is sufficient in trover. Now, if a bailee, having a less interest than a pledgee, attempt to sell the property in his custody, what is the nature of the act? It is nothing less than a renunciation of any qualified interest, for the act is an assertion of ownership. In the case of an unpaid vendor, like the defendant in *Milgate v. Kebble*, it is a repudiation of the original sale; the vendor ignores that transaction, and puts himself in the position of never having had the negotiation. In other words, he renounces the right of possession under which the goods remain in his custody; and that right thereafter is revested in the owner, giving him the requisite ground upon which to sue.

It is not the sale, however, that revests the right of possession in the owner of the chattel, but the assertion of dominion by the bailee. By the sale, indeed, he could not acquire the right; for if he had not obtained it before that act, the sale would transfer it to the purchaser, so that neither party would be liable in trover. The attempt to sell, and not its execution, is the renunciation; and this it is that divests the bailee, and revests in the owner the right of possession. This will clearly appear by considering the case of a valid agreement by the bailee to sell the goods at a future day. It is clear that in such a case the owner would not be required to wait till the agreement was performed before suing.

The above view is the legitimate result of the doctrine of *Sargent v. Gile*, 8 N. H. 325, confirmed in *Bailey v. Colby*, 34 N. H. 29, and in other cases cited in the earlier part of this note.

Indeed, if this view were not correct, the action of trover could be maintained only in those cases where the defendant either was a trespasser in getting possession of the goods, or was a bailee without interest, and subject to be dispossessed at the will of the owner; for if the defendant was rightfully in possession, and had a lien upon the goods at the time of the sale, the plaintiff could not acquire the right of possession necessary for the action.

If it be thought that the reasoning that the sale of the chattel is necessarily a renunciation of the right of possession under the plaintiff is too great a refinement, the answer is that, at all events, the almost universal doctrine of the courts has been that a sale by a bailee (not a pledgee) terminates the bailment, for whatever reason, so as to give the owner of the goods the right of possession.

It was so decided in *Cooper v. Wilomatt*, 1 Com. B. 672. In that case goods were sold by one Savage to the plaintiff, who thereupon allowed Savage the use of them at a weekly rent, upon his undertaking to deliver them on demand. Savage afterwards sold and delivered the goods to the defendant, who purchased them in good faith. It was held that the plaintiff could maintain trover. The defendant contended that the effect of the agreement to give Savage the use of the goods was that of a demise of the property, in which case trover could not be maintained, on the ground that the plaintiff would not have been entitled to the possession at the time of suit; but Tindal, C. J., answered this by saying that even if that were the proper construction of the agreement, it was such a demise as might at any time be terminated by the plaintiff. And the

demand upon the defendant had put an end to the tenancy as well as if it had been made upon Savage. But even if the tenancy could not be considered as terminated, the learned Chief Justice thought the action maintainable, upon the authority of *Loeschman v. Machin*, the principal case; and of this opinion were the other judges.

See also to the same effect, *Coffey v. Wilkerson*, 1 Met. (Ky.) 101; *Buckmaster v. Mower*, 21 Vt. 204; *Crocker v. Gullifer*, 44 Maine, 491; *Bailey v. Colby*, 34 N. H. 29; *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Emerson v. Fisk*, 6 Green, 200; *Galvin v. Bacon*, 2 Fairf. 28; *Johnston v. Whittemore*, 27 Mich. 463.

The difficulty in *Milgate v. Kebble* arose, perhaps, from the supposition that in an action of trover the plaintiff, if he succeed, must be allowed the full value of the goods, regardless of the sum due; for which there has been some authority. See cases considered by Williams, J., in *Johnson v. Stear*, 15 Com. B. n. s. 330, 337. But while it is true that the measure of damages in trover covers the value of the goods, this is only a *prima facie* presumption, and the more recent cases hold that the amount may be reduced by the sum remaining due to the defendant; so that the plaintiff in fact recovers no more than the amount of the loss. *Chinery v. Viall*, 5 Hurl. & N. 288; *Johnson v. Stear*, 15 Com. B. n. s. 330; *Brierly v. Kendall*, 17 Q. B. 937; *Neiler v. Kelley*, 69 Penn. St. 403; *Work v. Bennett*, 70 Penn. St. 484. See also *Story, Bailments*, § 315; *Clark v. Dearborn*, 103 Mass. 335; *Whitney v. Beckford*, 105 Mass. 267.

Just this difficulty has caused the suggestion to be made in several of the cases that the plaintiff's right of action

for the wrongful sale under such circumstances is an action on the case for the breach of contract as to the holding, where he can recover only for his actual loss. See *Bloxam v. Sanders*, 4 Barn. & C. 941, 949; *Johnson v. Stear*, 15 Com. B. N. S. 330, 335; *Halliday v. Holgate*, Law R. 3 Ex. 299, 302; also the remark of Cockburn, C. J., in *Donald v. Suckling*, *supra*, p. 419. But the difficulty is removed by the assimilation of the damages in the two actions.

As to the bailee, it therefore becomes of little importance whether his act in cases of this kind (that is, where he has a lien, but nothing more) be considered a conversion or not, for he is at all events liable in contract for the actual damage done by his breach of trust, and the bailor can recover no greater damages in trover.

But the effect of *Milgate v. Kebble* does not stop here; for, if there be no conversion in a case of this kind, the bailee's right of possession is transmitted to the purchaser. Trover, therefore, could not be maintained against him; and, as he is in no situation of contract with the bailor of the goods, he takes the bailee's interest in the property, and is clear of all present liability. If, however, the view we have taken be correct, supported as it is by the great preponderance of authority, it follows that, as the act of the bailee reinvested the owner with the right of possession, nothing but the actual possession passes to the purchaser, and the owner can follow the property, and, if it be withheld from him, recover its full value in trover upon his right to the possession of it.

(d.) *Disposal of Part of Chattel.*—It is not necessary that there should be a sale of the entire chattel in these

cases; it is often equally an act of dominion, amounting to a conversion, to attempt to aliene a portion of the goods. In *Gentry v. Madden*, 3 Pike, 127, the defendant had found a raft of timber on a sandbar in a river, had taken possession of it, hired a person to assist in removing part of it, and sold that person his interest in the residue, reserving to himself the portion removed; and it was held that this was a conversion of the whole raft.

But upon general principles, where there is a distinct bailment of several different articles, though all be bailed at the same time, a conversion of one will not operate as a conversion of all. How it would be where the bailment was tortious, *quære*? See *Gentry v. Pike*, *supra*.

The principle seems to be that where the act of misappropriation implies an act of dominion over the whole chattel, it is a conversion of the whole. See *Bowen v. Fenner*, 40 Barb. 383; *Richardson v. Atkinson*, 1 Strange, 576. But see *Philpott v. Kelley*, 3 Ad. & E. 108, 116, 117.

(e.) *Owner allowing another to sell his Goods.*—If the owner of goods stand by and see them sold as the property of another without asserting his title to them, or if, upon inquiry by one whom he knows to be about purchasing them, he represents them to belong to another, he will not be able to take them from the purchaser, or recover their value in trover; though the party selling had no authority to make the sale. *Heane v. Rogers*, 9 Barn. & C. 586; *Pickard v. Sears*, 6 Ad. & E. 469; *Stephens v. Baird*, 9 Cowen, 274; *Dezell v. Odell*, 3 Hill, 215; *Bigelow, Estoppel*, 473 *et seq.*

And it seems that in such case the purchaser could himself maintain trover

against such owner, since in a contest between them in regard to the goods the latter would be estopped to assert a title to them.

But a subsequent purchaser under an execution against the true owner could maintain trover from one who had previously purchased under the circumstances above mentioned. *Richards v. Johnston*, 4 Hurl. & N. 660. The reason of this probably is, that the estoppel could not operate to transmit any title to the first purchaser, but merely operated to preclude the owner from asserting his title against him. The second purchaser, however, acquires the title to the goods; and, as the estoppel of the owner is not an interest in the property, it is not transmitted under the sheriff's sale. Nor is a purchaser, it would seem, in the situation of a privy to the vendor, in such cases; being unlike an assignee, who is but the representative of the assignor. But the reason given by the court in the case cited was, that the *sheriff* was not bound by the estoppel against the owner, and the purchaser claimed adversely to, and not under, the latter. If this be the true reason, a purchaser from the owner, though without notice of the previous transaction, could not claim the goods, because of the estoppel. *Sed quare*.

(f.) *Surpassing Limit of Authority to sell*. — A person having due authority to sell the property of another may also be guilty of conversion. Such will be the case if he fail to conform in a material particular to the terms of his authority. It has been so held where the defendant had receipted to the plaintiff for certain shares of stock to be sold on commission, and, instead of selling, the defendant exchanged the shares for other property. *Haas v. Damon*, 9 Iowa, 589. But this may be

doubted if the transaction was within the general scope of his authority, so as to give a good title to the party with whom he exchanged. Clearly, if an agent merely sell at a lower price than his instructions allowed, this will not amount to a conversion, though he becomes liable for misconduct. *Sargeant v. Blunt*, 10 Johns. 74. See *Cairnes v. Bleecker*, 12 Johns. 300. But where the owner of a promissory note past due put it into the hands of B. for collection, and B. sold it to S., who converted it to his own use, it was held that the owner might maintain trover against S. *Seago v. Pomeroy*, 46 Ga. 227.

(g.) *Pledging Goods*. — Another illustration of an act of dominion may be found in the case of a pledging of property by one having no authority. In *Thrall v. Lathrop*, 30 Vt. 307, the plaintiff brought trover for a heifer which had been in possession of one Preston on hire. Preston borrowed money of the defendant and gave him a bill of sale of the heifer in security of payment. He afterwards borrowed money of the plaintiff, and gave him also a bill of sale of the animal; the plaintiff not knowing that this was the heifer which in fact belonged to him. The heifer remained in the possession of Preston until taken by the defendant, when the latter was informed by the plaintiff that the property was his, under his bill of sale. It was held that the plaintiff was not estopped to claim the heifer, upon the plain principle that an admission made in ignorance of one's rights is not binding.

In *Carpenter v. Hale*, 8 Gray, 157, goods intrusted for a special purpose were pledged by the party in possession; and it was held that the pledgee, after notice of the true ownership and a demand of the property, was liable in

trover to a subsequent purchaser of the owner's rights, after a demand by such purchaser, although, after the first demand and before the second, he had sold the property.

The case of a repledge by a pledgee has already been considered; but it may be remarked that the dissenting opinion of Mr. Justice Shee in the principal case, *Donald v. Suckling*, is given as representing what has heretofore been generally supposed to be the law in this country. *Lawrence v. Maxwell*, 53 N. Y. 19; *Hope v. Lawrence*, 1 Hun, 317. In view of the fact, however, that the ruling of the majority of the court in that case has been reaffirmed by the unanimous judgment of the Exchequer Chamber (*Halliday v. Holgate*, Law R. 3 Ex. 299), it is probable that the doctrine of the case will be accepted in America. See also *Bryan v. Baldwin*, 52 N. Y. 232.

A mortgage being a higher security than a pledge, it would seem that a sale of goods by a mortgagee would not be a conversion; and this is to be inferred from the language of Willes, J., in *Halliday v. Holgate*. But it has lately been held that a mortgagee who has waived, though by parol, the foreclosure of a mortgage of personalty becomes liable for conversion by subsequently selling the property, without the assent of the party for whom the waiver is made. *Phelps v. Hendrick*, 105 Mass. 106. But *quære* if this would be more than a breach of contract? Would not a *bona fide* purchaser get a good title? And if trover could not be maintained against the purchaser, upon demand and refusal, could it be maintained against the vendor? It seems clear, however, from the language of the judges in *Donald v. Suckling*, that if the pledgor should offer to redeem, he

could bring trover for the pledge if it should not be restored to him; and it has been so held in favor of a mortgagor seeking to redeem, where the mortgagee had sold the chattel before condition broken. *Eslow v. Mitchell*, 26 Mich. 500.

(h.) *Appropriating an article held in bailment to a different use* from that agreed upon is another of this class of cases. If, for instance, a man deliver a horse to another to ride to York, and he rides it to Carlisle, this is a conversion. *Isaack v. Clark*, 2 Bulst. 306; *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136; *Fisher v. Kyle*, 27 Mich. 454; *Horsly v. Branch*, 1 Humph. 199; *Crocker v. Gullifer*, 44 Maine, 491; *Spencer v. Pilcher*, 8 Leigh, 565.

It has been held that in such cases there can be no right of action in trover unless the chattel be injured in the misappropriation. *Johnson v. Weedman*, 4 Scam. 495. But this may well be doubted. The foundation of the action is the usurpation of the owner's right of property, and not the actual injury caused, as the cases already considered show. The difficulty in the mind of the court in *Johnson v. Weedman* seems to have been that to allow the plaintiff to recover where the chattel was not injured would subject the defendant to damages to its full value; but this is a mistake, as we have seen. The value of the chattel would be the *prima facie* measure of damages; but the defendant could return or offer to return it, in mitigation, and this might reduce the damages to a mere nominal sum. 1 Chitty, Pleading, 161; *Delano v. Curtis*, 7 Allen, 470. It is to be observed that such of the old cases and *dicta* as have held that judgment in trover vests

the property in the defendant (which would prevent the right of return after suit) have been overruled. See *Brinsmead v. Harrison*, Law R. 6 C. P. 584; *Lovejoy v. Murray*, 8 Wall. 1; *Brady v. Whitney*, 24 Mich. 154.

It has been supposed in Massachusetts and in Rhode Island that this doctrine would not apply to the case of the unauthorized use of property bailed on Sunday. *Gregg v. Wyman*, 4 Cush. 322; *Whelden v. Chappel*, 8 R. I. 230. But this notion has been repudiated in other States, and has recently been exploded in Massachusetts. *Woodman v. Hubbard*, 25 N. H. 67; *Morton v. Gloster*, 46 Maine, 420; *Hall v. Corcoran*, 107 Mass. 251; *Frost v. Plumb*, 13 Am. Law Reg. N. S. 537.

In *Hall v. Corcoran*, the defendant had hired a horse to drive to North Adams, on Sunday, for pleasure only, as both parties knew. The horse was driven beyond North Adams to Clarksburg, and on the return to the former place was injured. It was held that the defendant was liable for conversion. "The fact," said Mr. Justice Gray, "that the owner of property has acted or is acting unlawfully with regard to it is no bar to a suit by him against a wrong-doer, to whose wrongful act the plaintiff's own illegal conduct has not contributed. Thus, an action lies against one who takes and appropriates to his own use property kept by the plaintiff in violation of a statute, and therefore liable to be destroyed. *Cummings v. Perham*, 1 Met. 555; *Ewings v. Walker*, 9 Gray, 95.

"The judgment in *Gregg v. Wyman* is based upon two propositions: 1st. That the action, though in form tort, yet was essentially founded on a violation by the defendants of the contract of letting, in driving the horse

beyond the place specified in that contract. 2d. That if the action was not to be considered as founded on the contract, still, to make the defendants wrong-doers, it was necessary for the plaintiff to show his own illegal act in letting the horse. But, with the greatest deference to the opinion of our predecessors who concurred in that decision, we are constrained to say that we do not think that either of these propositions can be maintained."

The learned judge proceeded to show, in support of the position of the court, that it was immaterial in trover how the defendant became possessed of the goods, whether by contract or by trespass; and he referred to the cases of conversion by infants who had been intrusted with goods, as showing that the invalidity of the contract by which possession was obtained was of no importance. *Furnes v. Smith*, 1 Rol. Ab. 530; *Vasse v. Smith*, 6 Cranch, 226, 331; *Campbell v. Stakes*, 2 Wend. 137, 144; *Fitts v. Hall*, 9 N. H. 441; *Towne v. Wiley*, 23 Vt. 355; *Lewis v. Littlefield*, 15 Maine, 233. "The distinction," he further observed, "between an action for misusing a horse in violation of the contract of letting, and an action for the conversion of the horse by driving it to a place without the contract, is clearly marked in the early cases in this court, in which, while the old rules of pleading prevailed, it was decided that an action for driving the horse beyond the distance agreed might be in trover, without regard to the question whether the horse had been misused; and that an action for immoderately driving the horse upon a journey authorized or assented to by the owner must be in case for the misfeasance, and not in trover for a conversion. *Wheelock v. Wheelwright*, 5 Mass. 104;

Homer v. Thwing, 3 Pick. 492; Rotch v. Hawes, 12 Pick. 136. See also Lucas v. Trumbull, 15 Gray, 306."

The conclusion therefore was, that the right of action was not founded in contract; and as the wrong complained of was not a breach of contract, or an abuse of the possession acquired, but a direct invasion of the plaintiff's right of property, regardless of contract, it followed that it was not necessary for the plaintiff to show the contract. And if proved by the defendants, by cross-examination of the plaintiff's witnesses or otherwise, it had nothing to do with the plaintiff's cause of action.

(i.) *The mere attachment of goods already levied upon* does not amount to a conversion, though the attaching officer request a person acting as agent of the debtor to look after and take care of the property, and to tell all persons who should come there that it was attached. This having no tendency to impair or interfere with the rights of the first attaching officer, he could not maintain an action for the conversion of the goods. Polley v. Lenox Iron Works, 15 Gray, 513; Fernald v. Chase, 37 Maine, 289; Rand v. Sargent, 23 Maine, 326; Bailey v. Adams, 14 Wend. 201. Nor will evidence that the creditor in the second attachment suffered the property to be sent away and sold, himself receiving the proceeds of the sale, make out a case of conversion against him. Polley v. Lenox Iron Works, 2 Allen, 182. To support the action there must be a positive tortious act. *Ib.*; Bromley v. Coxwell, 2 Bos. & P. 439; Dorman v. Kane, 5 Allen, 38, where it was held no conversion that goods were stolen from an officer. See the above case of Polley v. Lenox Iron Works again in 4 Allen, 329, where there was evidence

of such positive acts. So, in Fitzgerald v. Jordan, 11 Allen, 128. See also Thompson v. Moesta, 27 Mich. 182.

(j.) *Where the Goods are not converted to Defendant's Use.* — In the foregoing classes of cases the defendant has appropriated the goods directly to his own use; but there are other cases where, without so appropriating the goods, he becomes liable for conversion. In these cases there must be an intention to deprive the owner for *some* period of time of the use of his property; except in the case of a common carrier, who, being an insurer, is liable for a misdelivery of goods, though it be by mistake. Devereaux v. Barclay, 3 Barn. & Ald. 704; Claffin v. Boston & L. R. Co., 7 Allen, 341.

There are many cases to illustrate an act of dominion of this kind. In Simmons v. Lillystone, 8 Ex. 431, the evidence to support a count in trover for the conversion of certain pieces of timber was that the plaintiff's timber being on the close of the defendant, he removed it, and the pieces having been again placed there, and having become embedded in the soil, the defendant directed his workmen to dig a saw-pit at the place, and in digging the pit the timber was cut through; part remaining embedded in the soil, and the rest being washed away by the water of a river flowing by. It was held that this was not sufficient evidence of a conversion. "In order to constitute a conversion," said the court, "there must be an intention of the defendant to take to himself the property in the goods or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered

as appropriating it to his own use. In this case nothing is done but cutting the timber, and, by accident, it is washed away by the river, — not purposely thrown by the defendant to be washed away; consequently we think that does not amount to a conversion."

In *Fouldes v. Willoughby*, 8 Mees. & W. 540, which was trover for two horses, it appeared that the defendant was manager of a ferry from Birkenhead to Liverpool, and that the plaintiff had embarked on board the defendant's ferry-boat at the former place, having with him the horses in question. When the defendant came on board it was reported to him that the plaintiff had behaved improperly on board; and the defendant then told the plaintiff (who had paid the usual fare for the carriage of the horses) that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took them from the plaintiff and put them on shore; and they were conveyed to a hotel kept by the defendant's brother. The plaintiff remained on board, and was conveyed to Liverpool. On the following day the plaintiff sent for the horses, but they were not delivered to him. A message was, however, afterwards sent to him that he might have the horses on sending for them and paying for their keeping, and stating that if this were not done they would be sold to pay the expenses. They were accordingly sold; and this action was thereupon brought. The defence was, that the plaintiff having misconducted himself on board, the horses were put off to get rid of the plaintiff by inducing him to follow them. The judge at *nisi prius* told the jury that the defendant, by taking the horses from the plaintiff, and turn-

ing them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct justified his removal from the boat, and he had refused to go without his horses. This was held a misdirection. "Any asportation of a chattel," said Mr. Baron Alderson, "for the use of the defendant, or a third person, amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it, and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion; for its effect is to deprive me of it altogether. But the question here is, where a man does an act the effect of which is not for a moment to interfere with my dominion over the chattel, but on the contrary recognizing my title to it, can such an act as that be said to amount to a conversion? I think it cannot. . . . The question ought to have been left to the jury to say whether the act done by the defendant, of seizing these horses and putting them on shore, was done with the intention of converting them to his own use; that is, with the intention of impugning even for a moment the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not." And the other judges were of the same mind.

Mr. Baron Rolfe states clearly in this case the distinction between trespass and conversion. "Suppose I," he observes, "seeing a horse in a ploughed field, thought it had strayed, and, under that impression, led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse to my own use? [See *Wilson v. McLaughlin*, 107 Mass. 587, a still stronger case of this kind.] Or suppose a man drives his carriage up into an inn-yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not. The same principle applies to the case which has been cited of *Bushell v. Miller*, 1 Strange, 128, where a party was held to have a right to move certain goods of another person, provided he put them back again; his not putting them back may give the other a right to bring trespass against him, on the ground that his subsequent neglect made him a trespasser *ab initio*; but it is clear that there was no conversion of the chattel."

There are other cases which show that one may deprive another of the possession of his goods without being guilty of conversion. In *Thorogood v. Robinson*, 6 Q. B. 769, the plaintiff's goods and servants were on land which the defendant had recovered in ejectment. The defendant, upon entering under his writ of possession, turned the plaintiff's servants off the land, and would not let them remain for the purpose of removing the plaintiff's goods. There had been no demand and refusal, however; and it was held that the jury were justified in finding that there had been no conversion. The ground of

the decision was that the defendant's entry was rightful, and that his turning off the servants was proper. The plaintiff, it was conceded, had a right to the goods; but he should have sent some one with a proper authority to demand and receive them. If the defendant had then refused to permit the taking away of the goods, there would have been a clear conversion. See *Guthrie v. Jones*, 108 Mass. 191, where it was held that for a landlord to refuse to allow his tenant to remove certain chattels attached by him to the realty, but which were not fixtures, was a conversion.

Thorogood v. Robinson was decided upon the authority of *Needham v. Rawbone*, 6 Q. B. 771, note. In that case it appeared that the plaintiff had left his house, and in it the goods in question, in the care of his servant. The defendant entered the premises, alleging an authority from the Court of Chancery, placed a man in charge of the house, took an inventory of the goods, locked up the rooms containing them, prevented the plaintiff's servant from having access to the rooms, and finally obliged him to quit the premises, leaving the property under the defendant's control. The Lord Chief Justice thought there was no evidence of a conversion, and directed a nonsuit. Upon a rule *nisi* being granted for a new trial, Lord Denman said that it did not appear by the evidence that the plaintiff had not acquiesced in the taking, or that he might not have had the use of the goods if he had desired. But some two weeks later, after advisement, the court, without further observation, ordered the rule to be made absolute. This appears to have been upon the ground that the question should have been submitted to the jury; for the objection of the plaintiff in *Thorogood v.*

Robinson was that the court should have ruled that the facts there proved constituted a conversion, and in reply to this *Needham v. Rawbone* was cited. However, if it had also appeared that there had been a demand of the goods and a refusal to deliver them, the court would doubtless have decided that there was a conversion, and not left the question to the jury. These cases must therefore be accepted with caution on this point.

In *Bushel v. Miller*, 1 Strange, 128, it appeared that upon the Custom-House quay there was a hut, in which particular porters were accustomed to place small parcels of goods until they could be put on shipboard. Each of the porters, and among them the plaintiff and defendant, had a particular box or cupboard in the hut. The plaintiff, upon the occasion in question, put in goods in such a way that the defendant could not get to his box without removing them. He did accordingly remove them the distance of a yard, and without returning them went away, and the goods were lost. It was held that, though the defendant might be liable in trespass, there was no conversion.

The owner's goods were delivered to a third person in *Syeds v. Hay*, 4 T. R. 260. There the captain of a vessel carrying the plaintiff's goods had disobeyed the plaintiff's orders to land the goods on the wharf against which the vessel was moored, and, contrary to his own promise, delivered them to the wharfinger, though for the plaintiff's use, under the impression that the wharfinger had a lien upon the goods for wharfage fees; and it was held that, upon demand and refusal, it was a case of conversion, unless the captain (the defendant) could establish the wharfinger's right. Buller, J., said: "If one man, who is intrusted with the goods of another, put

them into the hands of a third person, contrary to orders, that is a conversion. If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me."

(*k.*) *Demand and Refusal*. — In most of the cases above stated, proof of the wrongful act of the defendant is sufficient to establish a conversion, without evidence of a demand for the goods and a refusal to restore them. In other cases, a demand and refusal are essential to the action. In every instance, as Chitty remarks, it is judicious to demand the restitution of the goods, or, if they cannot be returned, a recompense equivalent to their value and the amount of the damages sustained, previously to the commencement of proceedings. 1 Pleading, 157.

Refusal to restore the goods upon demand is only evidence of conversion; and whenever the conversion can be otherwise proved, it is not necessary for the plaintiff to show a demand and refusal. *Gilmore v. Newton*, 9 Allen, 171. As where a horse was purchased from one who had no right to sell it, and was used by the purchaser as his own. *Ib.* But these steps are a necessary part of his case where the defendant became, in the first instance, lawfully possessed of the goods, and the plaintiff is not prepared to prove some other distinct conversion. 2 Wms. Saund. 47 *e*; 1 Chitty, Pleading, 157; *Witherspoon v. Blewett*, 47 Miss. 570; *Hardy v. Wheeler*, 56 Ill. 152. Thus, in *Nixon v. Jenkins*, 2 H. Black. 135, where a trader, on the eve of bankruptcy, made a collusive sale of goods, it was held that his assignees could not maintain trover for them without proving a de-

mand and refusal. The reason given was that the parties were competent to contract; and there was no unlawful taking of the goods, though the transaction was liable to be impeached. The assignees, it was said, might affirm or disaffirm the contract; and if they thought proper to disaffirm it, they should have demanded the goods, and a refusal would then have been evidence of a conversion.

But if the defendant had sold the goods, having no title to them as against the assignees, this would have been a distinct act of conversion, rendering a demand unnecessary. *Bloxam v. Hubbard*, 5 East, 407. And so, where the assignees, under a wrongful commission in bankruptcy, have required the supposed bankrupt to deliver to them his books, he may sue them in trover without first demanding their return, for here is also a distinct act of conversion. *Summersett v. Jarvis*, 3 Brod. & B. 2.

It is held, also, that no demand is necessary where the defendant has refused to deliver the goods to any one, though the plaintiff was not at the time owner of the goods. *Delano v. Curtis*, 7 Allen, 470.

In *Jones v. Fort*, 9 Barn. & C. 764, where bills of exchange had been delivered by a trader to a creditor in contemplation of bankruptcy, with a view of giving the creditor a preference, and the amount due upon the bills was received by him after the bankruptcy, it was held that without a demand and refusal upon the creditor by the debtor's assignees, there was no conversion. The bills being in the hands of the defendant, it was his duty to receive the money when due.

It is held in a late case that an action for the conversion of interest coupons

of United States bonds cannot be maintained by the owner, from whom they have been stolen, against one who has received them, as an agent for exchange, in good faith and without gross negligence, from a party to the theft, and has transferred them by delivery and paid the proceeds to his principal before any demand made upon himself. *Spooner v. Holmes*, 102 Mass. 503.

But the most common case of the necessity of demand and refusal is where goods are put into the hands of another for a special purpose, upon an agreement to return them when the purpose is accomplished; as to which the rule of law is that a breach of the contract by the mere failure so to return the goods does not amount to a conversion. Before the bailee can be liable in trover in such case, if there was no misappropriation or other act of dominion, there must be a demand for the goods and a refusal to restore them. *Severin v. Keppell*, 4 Esp. 156. See also *Booraem v. Crane*, 103 Mass. 522, where the goods were intoxicating liquors, under the ban of the statute.

A refusal to deliver the goods upon due demand is, however, only *prima facie* evidence of a conversion. *Lockwood v. Dull*, 1 Cowen, 322; *Irish v. Cloyes*, 8 Vt. 33, 110; *Thompson v. Rose*, 16 Conn. 71. See *Johnson v. Couillard*, 4 Allen, 446. For the party may have lost the goods without fault. And as against persons who had ceased to be members of a firm, and are sued with the others in trover, demand and refusal are not even *prima facie* evidence of conversion. *Sturges v. Keith*, 57 Ill. 451.

And a refusal made *bona fide* on the ground that the defendant is not satisfied that the party making the demand is the owner of the goods, or authorized

to receive them, is no evidence of a conversion. *Sargent v. Gile*, 8 N. H. 325; *Leighton v. Shapley*, ib. 359; *Dent v. Chiles*, 5 Stewt. & P. 383; *Watt v. Porter*, 2 Mason, 77.

If the demand be not made upon the defendant himself, but merely left at his house, during his absence, it seems that a reasonable time and opportunity to restore the goods should be suffered to elapse before the defendant's non-compliance with the demand can be treated as a refusal amounting to a conversion. The non-compliance with the demand after a reasonable opportunity to obey it has been afforded is tantamount to a refusal, and is presumptive evidence of a conversion, casting upon the defendant the burden of explaining that the omission to deliver the goods is not a conversion. 1 Chitty, Pleading, 160; *White v. Dewary*, 2 N. H. 546; *Thompson v. Rowe*, 16 Conn. 71. See also *Wellington v. Wentworth*, 8 Met. 548. Without satisfactory explanation the evidence is conclusive. *Edgerly v. Whalan*, 106 Mass. 307.

In a recent case it was held erroneous to refuse to instruct the jury that no recovery can be had in an action for conversion unless it shall appear that before the demand and refusal the defendant had actually converted the goods, or that, at the time of the demand and refusal, he had it in his power to give up the property. *Johnson v. Couillard*, 4 Allen, 446.

The demand should usually be made of the party in possession; but in an action against a sheriff for an attachment of goods exempt, the plaintiff may put in evidence a demand upon the indemnifying creditor for a restoration and a refusal by him. *Mannan v. Merritt*, 11 Allen, 582.

It has been a point of serious difficulty whether the taking possession of goods by the vendee of a bailee having no authority to sell was such an act of conversion as to make the vendee liable in trover without a demand. The affirmative view has been maintained in *Hyde v. Noble*, 13 N. H. 494; *Galvin v. Bacon*, 2 Fairf. 28; *Parsons v. Webb*, 8 Greenl. 38; *Stanley v. Gaylord*, 1 Cush. 536; *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Freede v. Anderson*, 10 Mich. 357; *Whitman Mining Co. v. Tritle*, 4 Nev. 494; *Soames v. Watts*, 1 Car. & P. 400; *Yates v. Carnseed*, 3 Car. & P. 99; *Hurst v. Gwenop*, 2 Stark, 306. See also *Hilbery v. Hatton*, 2 H. & C. 822; *Chandler v. Ferguson*, 2 Bush, 163; *Deering v. Austin*, 34 Vt. 330.

In *Galvin v. Bacon*, Weston, J., said: "Whoever takes the property of another without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful which is not justified or warranted by law; and of this character may be some acts which are not attended with any moral turpitude. A party honestly and fairly, and for a valuable consideration, buys goods of one who had stolen them. He acquires no rights under his purchase. The guilty party has no rightful possession against the true owner; and he could convey none to another. The purchaser is not liable to be charged criminally, because innocent of any intentional wrong; but the owner may avail himself against him of all civil remedies provided by law for the protection of property."

This reasoning seems unanswerable when not applied to cases where the

owner has himself facilitated the defendant's act; as where he has put his goods into the hands of another to prevent their attachment, and they have been sold by the bailee without authority. *Quære*, whether, without fraud, a person, by putting goods into the hands of an agent or bailee who sells and delivers them, could not be said to have facilitated the taking? See the language of Wilde, J., in *Stanley v. Gaylord*, 1 Cush. 536, 558.

In New York, Pennsylvania, Indiana, Kentucky, and Connecticut, the doctrine of the above cases has been denied, and a demand deemed necessary. *Marshall v. Davis*, 1 Wend. 109; *Barrett v. Warren*, 3 Hill, 348; *Pierce v. Van Dyke*, 6 Hill, 613; *Nash v. Mosher*, 19 Wend. 431; *Talmadge v. Scudder*, 38 Penn. St. 517; *Wood v. Cohen*, 6 Ind. 455; *Sherry v. Picken*, 10 Ind. 375; *Justice v. Wendell*, 14 B. Mon. 12; *Parker v. Middlebrook*, 24 Conn. 207. See also 2 Greenleaf, Evidence, § 642.

Mr. Justice Metcalf, in *Stanley v. Gaylord*, *supra*, refers to the following English cases also as bearing somewhat against the doctrine held by him: *Cooper v. Chitty*, 1 Burr. 20; *Smith v. Milles*, 1 T. R. 475; *Wyatt v. Blandes*, 3 Campb. 396; *Carlisle v. Garland*, 7 Bing. 298; s. c. 10 Bing. 452; *Potter v. Starkie*, 4 Scott, 718; *Lazarus v. Waithman*, 5 Moore, 313; *Price v. Helyar*, 4 Bing. 597; *Dillon v. Langley*, 2 Barn. & Ad. 131. See also *Samuel v. Norris*, 6 Car. & P. 620, where a mere seizure of goods by strangers, who afterwards relinquished possession, was held not a conversion.

In New York a distinction is maintained between the case of a taking by delivery of the bailee in cases of this

kind, and a taking without delivery; it is conceded that in the latter case the purchaser commits a tortious act. *Ely v. Ehle*, 8 Comst. 506; *Nash v. Mosher*, 19 Wend. 431; *Marshall v. Davis*, 1 Wend. 109.

(L.) *Acts of Cotenants*.—It has also been a point of conflict in the authorities, whether a tenant in common or joint tenant can maintain trover against his companion for the sale, or rather attempted sale, of the absolute property of the common chattel. Most of the courts of this country have held that he can. *Weld v. Oliver*, 21 Pick. 559; *Wilson v. Reed*, 3 Johns. 175; *Hyde v. Stone*, 9 Cowen, 230; *Gilbert v. Dickerson*, 7 Wend. 449; *Mumford v. McKay*, 8 Wend. 442; *Dyckman v. Valiente*, 42 N.Y. 549; *White v. Brooks*, 43 N. H. 402; *Dain v. Cowing*, 22 Maine, 347; *Arthur v. Gayle*, 38 Ala. 359; *Williams v. Chadbourne*, 6 Cal. 559.

In *Weld v. Oliver* the court say: "Upon recurring to the origin of the doctrine so frequently stated, that one tenant in common cannot maintain trover against his cotenant unless there has been a destruction by him of the property thus holden in common, I think it will be found to have been originally asserted with reference to the right of one tenant in common to sue his cotenant in an action of trover, for the exclusive use and possession of the common property, and the denying to the other any participation in the same; and when thus applied it is entirely correct, upon the familiar principle that the possession of one cotenant is the possession of both, and he who has the present possession cannot be ousted. It is very clear that one tenant in common cannot maintain an action of trover against his cotenant for the

mere act of withholding from him the use of a chattel, the rights of both being such that he who has the possession cannot be guilty of a conversion by retaining it. Nor can one tenant in common object to the mere sale by the other of the interest of the vendor in the common property, and a delivery over of the chattel to the purchaser. Such a right results from the nature of the relation between the parties; and to this inconvenience each must be subject, the mere change of possession under such circumstances being no conversion. But the question arises, whether this be not the limit beyond which if one cotenant passes he subjects himself to an action by the other tenant for the conversion of his share of the property. The ordinary evidence of conversion is the unlawful taking or detention of goods from the possession of the true owner; but it is equally true that he who undertakes to dispose of my goods as his own property, thereby subjects himself to an action of trover. May not the assumption of property in, and a sale of, my undivided moiety by my cotenant be equally a conversion by him of the moiety belonging to me, as the sale by a stranger of an article in which I had the entire interest is a conversion of the whole property by the stranger?"

In *Wilson v. Reed* the position is thus stated: "Tenants in common of a chattel have each an equal right to the possession, and the law will not afford an action to the one dispossessed, because his right is not superior to that of the possessor; but tenants in common are not like partners. The latter may dispose of chattels by virtue of an implied authority to sell, without being liable as for a tort; whilst the former cannot dispose of them without violat-

ing the right of their cotenants. For a sale, therefore, of a chattel an action of trover will lie by one tenant in common against another."

In *White v. Brooks* the doctrine is put on the ground that a sale determines the common tenancy, upon the authority of 1 Chitty, Pleading, 40. And it was, therefore, held that trover or *indebitatus assumpsit* might be maintained by the injured tenant for his share of the proceeds of the sale against his cotenant, or trover against the purchaser.

As to this last position, it is to be observed that the cases cited by Chitty do not sustain him; and the doctrine must, probably, be limited to the case of an election by the injured tenant. He may elect to consider the tenancy terminated, and bring an action for money had and received against his cotenant (*Sanborn v. Morrill*, 15 Vt. 700); and whether he may bring trover against him or not, the cases hold that he cannot bring trover against the purchaser, at least, before a sale by him of the absolute property. *Dain v. Cowing*, 22 Maine, 347; *Kilgore v. Wood*, 56 Maine, 150. See *Trammell v. McDade*, 29 Tex. 360. And the reason is clear. The sale, whatever it purported, could not convey the plaintiff's interest without his consent; and the purchaser would only acquire the position of a cotenant with him, taking the position of the vendor. See *Ruckman v. Decker*, 8 C. E. Green, 283.

In England and in several of the States of the Union it is held that trover is not maintainable in cases of this kind. *Farrar v. Beswick*, 1 Mees. & W. 682; *Morgan v. Marquis*, 9 Ex. 145; *Mayhew v. Herrick*, 7 Com. B. 229; *Webb v. Danforth*, 1 Day, 301; *Oviatt v. Sage*, 7 Conn. 95; *Tubbs v. Richardson*, 6 Vt. 442; *Welch v. Clark*, 12 Vt. 681;

Sanborn v. Merrill, 15 Vt. 700; *Barton v. Burton*, 27 Vt. 93; *Pitt v. Petway*, 12 Ired. 69.

Some doubt was, indeed, raised upon this point by a *dictum* to the contrary by Mr. Baron Bayley in *Barton v. Williams*, 5 Barn. & Ald. 395, 403; but that *dictum* was apparently overruled in the later English cases above cited. In *Mayhew v. Herrick*, Mr. Justice Coltman said: "As to whether the plaintiff can maintain trover against the officer for the sale of his share of the partnership effects, it is conceded that the case of a sheriff is not distinguishable from that of any other joint owner of a chattel; and, that being so, the authorities are too strong to be got over that the mere sale of a chattel by one of two joint owners is not a conversion as against the other." And *Creswell and Williams, JJ.*, expressed the same opinion; though it was not necessary to the decision of the case.

A few years earlier Mr. Baron Parke had said in *Farrar v. Beawick, supra*, "I have always understood, until the doubt was raised in *Barton v. Williams*, that one joint tenant or tenant in common of a chattel could not be guilty of a conversion by a sale of that chattel unless it were sold in such a manner as to deprive his partner of his interest in it. A sale in market overt would have that effect." But the case was decided upon other grounds.

Morgan v. Marquis, the latest of the above English cases, seems, however, to be an express decision of the point. There one of two apparent partners had committed an act of bankruptcy, which, it was argued by the plaintiffs and not denied, operated as a dissolution of the partnership. *Burt v. Moulton*, 1 Crompt. & M. 525; *Ransbottom v. Lewis*, 1 Campb. 279; *Abel v. Sutton*, 3 Esp.

108. See *Harvey v. Crickett*, 5 Maule & S. 336. It was accordingly urged that the solvent party had no authority, after the act of bankruptcy, to dispose of the property as if the partnership still continued; and the solvent partner having, after the bankruptcy, directed the defendants, commission merchants, to sell certain flour of the (late) partners, which they had done, it was contended that they were liable either for money had and received to the use of the bankrupts, or in detinue. But the Court of Exchequer ruled otherwise. Pollock, C. B., said: "This is an action by the assignees of a bankrupt to recover the proceeds of certain goods sold by the defendants. The jury have found as a fact that one Shute [the solvent party] was jointly interested with the bankrupt in the goods; and no application is made to disturb the verdict on that ground. The defendants sold the goods in question after the bankruptcy by the direction of Shute; and I am of opinion that they were justified in so doing, since they had the authority of the solvent partner, who had a right to deal with the property as his own." Parke, B.: "Shute, the solvent partner, directed the defendants to sell the flour. Now it is clear that one tenant in common may dispose of the common property; and, therefore, when the flour was sold by the defendants, it was properly sold, so far as Shute was concerned. Then the effect of the bankruptcy was to render the assignees tenants in common of the goods with Shute. But it is well established that one tenant in common cannot maintain an action against his companion unless there has been a destruction of the particular chattel, or something equivalent to it. That being so, the defendants are not wrong-doers, for they have acted under lawful au-

thority." And the learned Baron added that the matter should be settled by an account between the parties, either in the Court of Bankruptcy or in equity.

This opinion of Parke, B., was founded upon *Fox v. Hanbury*, 2 Cowp. 445, in which it was expressly held that trover would not lie by the assignees of a bankrupt partner against a *bona fide* consignee of the solvent partner for the value of a consignment of part of the firm property made after the bankruptcy. And this case has frequently been followed. *Smith v. Stokes*, 1 East, 363; *Smith v. Oriell*, ib. 368; *Harvey v. Crickett*, 5 Maule & S. 336; *Woodbridge v. Swann*, 4 Barn. & Ad. 633. In *Smith v. Stokes* the goods had been "sent to Monmouth, directed to A. and B., and received by the defendant" after the act of bankruptcy of one of the partners of a firm; and it was held that the assignees became tenants in common with the solvent partner; "and then," said Lord Kenyon, "the rule of law attaches, that one tenant in common cannot maintain trover against another." In *Smith v. Oriell*, the solvent partner had delivered the property over to the defendant in payment of a debt; and Lord Kenyon said that the defendant stood in the same situation as the solvent partner himself, thus indicating his opinion that the latter had not been guilty of a conversion. In *Harvey v. Crickett* and in *Woodbridge v. Swann*, the court went further still, and held that it made no difference that the defendant, claiming under the solvent partner, had notice of the bankruptcy at the time of the transaction in question. In the latter case the court explained *In re Wait*, 1 Jac. & W. 605, which was urged as contrary; saying that the chancellor, when sitting in bankruptcy, exercises an *equitable* as

well as legal jurisdiction. See also *Morgan v. Marquis*, *supra*, per Parke, B.

Turning to the American cases above cited, the court in *Oviatt v. Sage*, 7 Conn. 95, 99, say that it is familiar law that nothing short of a destruction of the common property will render the cotenant liable in tort; "for he has an equal right with his fellow-commoner to the possession and use of the property."

In *Tubbs v. Richardson*, 6 Vt. 442, the cotenant had sold a part only of the common property; and it was held that, conceding that a sale of the whole would be a conversion, the sale of part was not. But in *Sanborn v. Merrill*, 15 Vt. 700, the doctrine was extended to the case of a sale of the entire property. The subject was examined with learning and ability in this case; and the doctrine that a sale of the chattel is a destruction of it was controverted. "We have already remarked," said Hebard, J., speaking for the court, "that this action may be maintained for a destruction of the property by one tenant in common against his cotenant; and those authorities which sustain the action do so upon the notion that a sale is equivalent to a destruction. I think there is difficulty in sustaining the action upon this ground. If the defendant had no right to sell this property, then his attempting to do so did not divest the plaintiff of his interest in it; and while the plaintiff had an interest in the property, so that he could pursue it, I cannot see how it can be said that the property was destroyed. There can be no destruction of the property arising from the sale, only upon the supposition that the defendant was authorized to sell it, or, having sold it, that the plaintiff has ratified the sale; and in either of these

cases it would not be pretended that the plaintiff could maintain trover; but the action should be in form *ex contractu*," — that is, for the value of the plaintiff's share. This case was reaffirmed in *Barton v. Burton*, 27 Vt. 93.

In *Pitt v. Petway*, 12 Ired. 69, the North Carolina court say: "In our State it is held that if a tenant in common takes a slave out of the State to parts unknown, and sells him, the cotenant may treat this as a destruction of the property. But the idea that a sale to a citizen of the county is tantamount to a destruction is now advanced for the first time and cannot be sustained, without putting a tenant in common upon the footing of a mere wrong-doer, with whom there is no privity; for which position there is no authority and no reason." See to the same effect *Lucas v. Wesson*, 3 Dev. 398. But the carrying away must, it should seem, within these authorities, result in or amount to a loss or destruction of the common property in order to an action in *trover*. *Ripley v. Davis*, 15 Mich. 78; *Knight v. Coates*, 1 Irish L. R. 53; *Heath v. Hubbard*, 4 East, 110, 121, citing *Barnardiston v. Chapman*, Hil. 1 Geo. 1, Bull. N. P. 34, 35. In *Jones v. Brown*, 25 L. J. Ex. 345, it was held that the secret removal of the chattel with intent to sell the same and apply the proceeds to the defendant's use, would not authorize trover. As to the rule in trespass, see note on that subject, *ante*, p. 358.

It is clear from the old authorities that an action of trover cannot be maintained by one tenant for a dispossession by the other. Littleton, referred to in several of the above cases, says, in § 323: "If two be possessed of chattels personal in common by divers

titles, as of a horse, an ox, or a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common when he can see his time. In the same manner it is of chattels real, which [i.e., such as] cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law but to take the infant out of the possession of the other when he sees his time." See Coke's Commentary, Coke Litt. 200 a, where other examples are given. In this connection Coke also gives several cases from the Year-Books where an action between cotenants was sustained; but these were all cases in which there was a destruction of the common interest, or something tantamount thereto. The following may be noticed: If there be two tenants in common of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant shall have an action of trespass; and the form of the writ there given shows that the destruction of the common property was part of the plaintiff's case. The allegation was, *per quod volatum columbaris sui totaliter amisit*. And so it is, says Coke, in the next case, if two tenants in common be of a park, and one destroyeth all the deer, an action of trespass lieth. Again, if two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for destruction

of doves. (As to this see *Wilkinson v. Haygarth*, 12 Q. B. 837, 843, note; *Higgins v. Thomas*, 8 Q. B. 908; *Murray v. Hall*, *ante*, p. 343.) And if two several owners of houses have a river in common between them, if one of them corrupt the river the other shall have an action upon his case.

If, then, we are to accept these authorities, it follows that trover cannot be maintained for any thing short of a substantial destruction of the common property. It is not necessary, indeed, that the chattel itself should be destroyed, but only that the community of title, or rather the interest of the plaintiff, should be broken up; as in the case of a sale in market overt, or, perhaps, as held in North Carolina, by a transportation of the chattel beyond the State into parts unknown. *A fortiori*, if there be a destruction of the *res*, "for there can be no tenancy in common of a thing destroyed." 14 Viner, Abr. 516, Joint Tenants, S, a, pl. 15. The plaintiff's interest in the chattel is not affected by a sale, except in the cases just mentioned; if destruction is the test, his action cannot be upheld.

It would seem upon principle that this should be the test, because this alone affects the plaintiff's interest in the chattel. It is not enough to say that he may be seriously injured by a (professed) sale of the entire property. So he may be by a sale of only the cotenant's interest; but he takes upon himself the danger of disturbances of this kind, in accepting the position of cotenant. It is one of the incidents of the situation. The plaintiff is no worse off after the one sale than after the other; and it is conceded that trover cannot be maintained where the vendor professes to sell nothing more than his own interest.

If it should be said that in the other case there is an assumption of exclusive dominion over the chattel, the answer is, that it has always been admitted that one tenant of common property may exclude the other from all right and participation in the enjoyment without committing a conversion; and this certainly is exercising an exclusive dominion over the property. Besides, it is only necessary to refer to the principal case, *Donald v. Suckling*, and to *Halliday v. Holgate*, Law R. 3 Ex. 299, elsewhere considered in this note, to show that (in England at least) the exercise of the absolute dominion of a sale or repledge of a chattel is not a conversion, though done by a person holding a position apparently of inferior authority to that of a cotenant.

It is to be observed that it has been decided in modern times, contrary apparently to the old authorities, that *trespass* will lie for an expulsion or other ouster of a cotenant; and this on the ground that ejectment, which includes trespass, has always been held to lie. (*Quære*, if the rule extends beyond such chattels real as are *severable*. See Littleton, § 323, and the commentary thereon in Coke Litt. 202 a); *Murray v. Hall*, *ante*, p. 343; *Wilkinson v. Haygarth*, 16 Law J. Q. B. 103; s. c. 12 Q. B. 837. See also note on Trespass, *ante*, p. 359.

Perhaps the reason why trover cannot be maintained where the act of the defendant does not amount to a severance, and therefore a destruction of the common interest, while the contrary is true of trespass in certain cases amounting to an ouster, is this: that in the former action the plaintiff is entitled, *prima facie*, to recover the value of the chattel; and judgment for him, therefore, would be equivalent to de-

claring that he was entitled to the chattel as against his cotenant, which would be inconsistent with the relations of the parties. It is different where there has been a wrongful severance by the defendant, and the plaintiff then sues for the conversion of his interest. But in *trespass* for an ouster the plaintiff complains merely of the injury which he has suffered by being expelled or kept out of possession of the common property.

It follows from the above view that in *trover* it is not enough for the defendant to plead that the chattel was common property of the parties; for the plaintiff's allegation of a conversion is construed to mean a severance and destruction, since there is no conversion short of a severance. The defendant must therefore deny the destruction if he pleads specially. This was so decided in *Higgins v. Thomas*, 8 Q. B. 908.

In the following cases *trover* was upheld though there was no destruction of the common property, but only a withholding or misuse of it, or a refusal

to sever. *Lobdell v. Stowell*, 51 N. Y. 70; *Agnew v. Johnson*, 17 Penn. St. 377; *Strickland v. Parker*, 54 Maine, 263; *Benedict v. Howard*, 31 Barb. 571; *Channon v. Lusk*, 2 Lans. 211; *Fiquet v. Allison*, 12 Mich. 328. These cases are founded upon the view that it is not necessary to prove a destruction.

As to changes of the form of the chattel, as by manufacture, this may often amount to a conversion. *Redington v. Chase*, 44 N. H. 36; *Webb v. Mann*, 3 Mich. 139; *Yawhill Bridge Co. v. Newby*, 1 Oreg. 174. But not where the change is made for the preservation of the chattel. *Fennings v. Grenville*, 1 Taunt. 246; *Kilgore v. Wood*, 56 Maine, 154. See further, as to destruction, *Delaney v. Root*, 99 Mass. 546; *Sheldon v. Skinner*, 4 Wend. 525; *Winner v. Penniman*, 35 Ind. 163; *Oatfield v. Waring*, 14 Johns. 188; *Nunnally v. White*, 3 Met. (Ky.) 584; *Davis v. Tingle*, 8 B. Mon. 539, 544; *Guyther v. Pettijohn*, 6 Ired. 388; *Lowe v. Miller*, 3 Gratt. 205; *Allen v. Harper*, 26 Ala. 686.

NUISANCE.

ST. HELEN'S SMELTING CO. v. TIPPING, leading case.

ROSE v. MILES, leading case.

Note on Nuisance.

Historical aspects of the subject.

Test of public or private nuisance.

Locality.

Bodily discomfort.

Mental discomfort.

Public nuisances.

Who liable.

Things authorized by statute or municipal license.

ST. HELEN'S SMELTING CO. v. TIPPING.

(11 H. L. Cas. 642. House of Lords, 1865.)

Injury to Property and Physical Discomfort. There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter, a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him; as to the former, the same rule would not apply.

Locality. Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages in respect of injury created by it to property in the neighborhood.

A place where the works of one person are carried on which occasion an actionable injury to the property of another is not, within the meaning of the law, "a convenient" place.

A. bought an estate in a neighborhood where many manufacturing works were carried on. Among others, there were the works of a copper-smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapors from these works, when they were in operation, were proved to be injurious to the trees on A.'s estate. At the trial, the judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbor; but that the law did not regard trifling inconveniences. Every thing must be looked at from a reasonable point of view; and therefore in the case of an alleged injury to property, as from noxious vapors from a manufactory, the injury, to be actionable, must be such as visibly to diminish the value of the property; that locality, and all other circumstances, must be taken into consideration, and that in all countries where great works have been and were carried on, parties must not stand on extreme rights. *Held*, that the direction was right.

THIS was an action brought by the plaintiff to recover damages for injuries done to his trees and crops by the defendant's works. The defendants are the directors and shareholders of the St. Helen's Copper-Smelting Company (limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor-house and about 1,800 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that "the defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapors, and other noxious matter to issue from the said works and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage were greatly injured; the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed; and also the reversionary lands and premises were depreciated in value." The defendants pleaded not guilty.

The cause was tried before Mr. Justice Mellor, at Liverpool, in August, 1863, when the plaintiff was examined, and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapors, which, when the wind was in a particular direction, affected persons as well as plants in his grounds. On cross-examination, he said he had seen the defendant's chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the part of the defendants, evidence was introduced to show that the whole neighborhood was studded with manufactories and tall chimneys; that there were some alkali works close by the defendant's works; that the smoke from one was quite as injurious as the smoke from the other; that the smoke of both sometimes united; and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendant's works existed before the plaintiff bought the property was also relied on.

The learned judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that

every thing must be looked at from a reasonable point of view ; and, therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it ; that when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration ; and that with respect to the latter it was clear that in countries where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

The defendant's counsel submitted that the three questions which ought to be left to the jury were, " whether it was a necessary trade ; whether the place was a suitable place for such a trade ; and whether it was carried on in a reasonable manner." The learned judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative ; whether the business there carried on was an ordinary business for smelting copper, and the answer was, " We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place the answer was, " We do not." The verdict was therefore entered for the plaintiff, and the damages were assessed at 361*l.* 18*s.* 4½*d.* A motion was made for a new trial on the ground of misdirection, but the rule was refused. 4 Best & S. 608. Leave was, however, given to appeal, and the case was carried to the Exchequer Chamber, where the judgment was affirmed. 4 Best & S. 616.

The judges were summoned, and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee attended.

After the argument, the Lord Chancellor (Lord Westbury) proposed these questions to the judges : " Whether directions given by the learned judge at *nisi prius* to the jury were correct ? or, Whether a new trial ought to be granted in this case ?"

Upon a short consultation among the judges, Mr. Baron Martin answered that the directions were correct, being such as had been given in cases of this kind for the last twenty years.

The Attorney-General (Sir R. Palmer) and Mr. Webster, for the appellants. Mr. Brett, Mr. Mellish, and Mr. Milward, for the respondents.

THE LORD CHANCELLOR. My lords, I think your Lordships will be satisfied with the answer we have received from the learned judges to the questions put by this House.

My lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, any thing that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from

certain large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of present appellants, in their works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your Lordships are asked to set aside that verdict and to direct a new trial is this, that the whole neighborhood where these copper-smelting works were carried on is a neighborhood more or less devoted to manufacturing purposes of a similar kind, and, therefore, it is said that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them (and they are sufficiently unfolded by the judgment of the learned judges in the court below), I advise your Lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal with costs.

LORD CRANWORTH. My lords, I entirely concur in opinion with my noble and learned friend on the woolsack, and also in the opinion expressed by the learned judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years; I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than

adopt the language of Mr. Justice Mellor. He says, "It must be plain that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury; because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honor of being one of the barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, "You must look at it, not with a view to the question whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields;" because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact, was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE. My lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think every thing is included. The defendants say, "If you do not mind, you will stop the progress of works of this description." I agree that it is so; because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights, and allow a person to say, "I will bring an action against you for this and that, and so on." Business could not go on if that

were so. Every thing must be looked at from a reasonable point of view ; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected."

My lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Judgment of the Exchequer Chamber affirming the judgment of the Court of Queen's Bench affirmed, and appeal dismissed with costs.

ROSE and Others *v.* MILES.

(4 Maule & S. 101. King's Bench, Easter Term, 1815.)

Public Nuisance. Where plaintiff declared that before and at the time of committing the grievance, he was navigating his barges, laden with goods, along a public navigable creek, and that defendant wrongfully moored a barge across, and kept the same so moored, from thence hitherto, and thereby obstructed, the public navigable creek, and prevented the plaintiff from navigating his barges so laden, *per quod* plaintiff was obliged to convey his goods a great distance overland, and was put to trouble and expense in the carriage of his goods overland. *Held*, that this was special damage for which an action upon the case would lie.

ERROR to reverse a judgment of the Common Pleas.

The plaintiff declares in one of the counts, that whereas the plaintiff, before and at the time of committing the grievances by the defendants, was lawfully possessed of certain barges and other crafts laden with goods, wares, and merchandises of the plaintiff, and just before and at the time of committing the grievances was navigating his said barges and craft so laden along a certain navigable creek, part of a certain public river, situate, &c., yet the defendants well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to prevent him from navigating his barges and craft, so laden as aforesaid, along the said public navigable creek, heretofore, to wit, on, &c., wrongfully and injuriously moored and fastened, and caused to be moored and fastened, a certain barge across the said public navigable creek and the channel thereof, and kept and

continued the said barge so moored and fastened across the said navigable creek and the channel thereof, for a long space of time, to wit, from thence hitherto, and thereby during all the time aforesaid obstructed the said public navigable creek and the channel thereof, and thereby prevented the plaintiff from navigating his said barges and craft so laden along the said public navigable creek; by reason of all which premises the plaintiff was not only during all the time aforesaid obliged to convey all his said goods, wares, and merchandises a great distance overland, but was also during the time aforesaid put to great trouble and inconvenience in carrying on his business, and hath been obliged to expend divers large sums of money, to wit, 500*l.*, in and about the carriages of his said goods, wares, and merchandises overland as aforesaid.

Plea, not guilty; and a general verdict for the plaintiff upon the whole declaration, with 20*s.* damages. And the errors assigned were, that the supposed obstructions in the public navigable river in the declaration mentioned are in the nature of a common nuisance to all the subjects of the realm, and not of a particular or private injury to the plaintiff; and it is not shown that the plaintiff has actually incurred or sustained any special damage by reason of such obstructions. Also, that the plaintiff has brought a personal civil action, and recovered damages therein for a grievance or nuisance remediable only by criminal prosecution. Also, that the declaration is not sufficient in law, &c. Joinder in error.

Marryat, in support of the errors.

LORD ELLENBOROUGH, C. J. In *Hubert v. Groves* the damage might be said to be common to all; but this is something different, for the plaintiff was in the occupation, if I may so say, of the navigation, he had commenced his course upon it, and was in the act of using it when he is obstructed. It did not merely rest in contemplation. Surely this goes one step farther: this is something substantially more injurious to this person than to the public at large, who might only have it in contemplation to use it. And he has been impeded in his progress by the defendants wrongfully mooring their barge across, and has been compelled to unload and to carry his goods overland, by which he has incurred expense, and that expense caused by the act of the defendants. If a man's time or his money are of any

value, it seems to me that this plaintiff has shown a particular damage.

BAYLEY, J. The defendants in effect have locked up the plaintiff's craft whilst navigating the creek, and placed him in a situation that he unavoidably must incur expense in order to convey his goods another way.

DAMPIER, J. The present case, I think, admits of this distinction from most of the other cases, that here the plaintiff was interrupted in the actual enjoyment of the highway. The expense was incurred by the immediate act of the defendants, for the plaintiff was forced to unload his goods, and carry them overland. If this be not a particular damage, I scarcely know what is.

PER CURIAM.

Judgment affirmed.

Heath was to have argued for the defendant in error.

Historical. — The subject of nuisance is one of the oldest heads of the English law. Speaking of public nuisances, Glanvill says: "A purpresture, or, more properly speaking, a porpresture, is when any thing is unjustly encroached upon *against the king*, as in the royal demesnes; or in obstructing public ways; or in turning public waters from their right course; or when any one has built an edifice in a city upon the king's street. And, generally speaking, whenever a nuisance is committed affecting the king's lands or the king's highway, or a city, the suit concerning it belongs to the king's crown. But purprestures of this description are inquired after either in the king's chief court, or before his justices sent into the different parts of the kingdom for the purpose of making such inquisitions by a jury of the place or vicinage. And if by such jury a man be convicted of having made any purpresture of this kind, he shall be amerced to the king to the extent of

the whole fee that he holds of him, and shall restore that which he has encroached upon; and if convicted of having encroached by building in a city upon the king's street, the edifices shall belong to the king, — those at least which are found to be constructed within the Royal District. And, notwithstanding, he shall be amerced to the king." Glanvill, by Beames, book 9, c. 11, pp. 238-240.

Private nuisances were also actionable at this time where they were in the nature of a disseizin, by disturbing a man's possession.¹ Redress for the injury was therefore sought in a real action, — the assize, an account of which will be found in the note on Trespasses upon Property, *ante*, p. 346. Glanvill says: "If any dyke should be raised or thrown down, or the pond of any mill be destroyed, to the injury of any person's freehold, and such offence has been committed within the time

¹ Disseizins were either *simplex* or *violenta*: Bracton, p. 162, c. 4; the former corresponding to the modern disseizins by election, the latter to actual disseizins.

limited by the king's assize, then, according to the subject-matter, the writs are varied in the following manner: 'The king to the sheriff, health. N. complains to me that R., unjustly and without a judgment, has raised a certain dyke in such a vill, or thrown it down, to the nuisance of his freehold in the same vill, since my last voyage into Normandy. And therefore I command you, if the aforesaid N. should make you secure of prosecuting his claim, then that you cause twelve free, &c., to view such dyke and tenement, and cause their names to be imbreviated. And summon,' &c. In the other case the writ reads: "N. has complained to me that R., unjustly and without a judgment, has raised the pond of his mill, in such a vill, to the nuisance of his freehold, in such vill, or in another vill, since my last voyage into Normandy," &c. Book 13, c. 34-37, pp. 336-338. The assize in such cases came afterwards to be called an assize of nuisance; the writ differing from a writ of novel disseizin in not expressly alleging a disseizin, and in not demanding a reseizin.

Three chapters are devoted to the subject of nuisance by Bracton; the first case he mentions being that of a private nuisance. If, says he, a man has a servitude and a right of pasture in the land of another, and the owner of the land does any thing by which the ingress is prevented, or made less convenient (*quo minus omnino ingredi possit, vel minus commode*), as if he should make a wall or ditch at the entrance, a wrongful nuisance (*nocumentum injuriosum*) is done; and that which is made may, *statim et recenter flagrante facto*, be thrown down and destroyed even with-

out a writ; but afterwards it can only be done under a writ. And the same, he adds, of a right of way over another's land, which is obstructed or narrowed. Lib. 4, c. 43, p. 231 b. And many other cases of the same kind are given. How well, indeed, the law was developed at this time appears from a passage at the close of the next chapter, where Bracton, distinguishing between nuisances that are both wrongful and harmful and those that are merely harmful, says that certain things which are annoyances to individuals are for the public good, and must be endured; such as the establishment of fisheries and ponds. And he tells us that one who confers such a benefit upon the public, within his own land, does no wrong to his neighbors, though they may suffer harm thereby. *Per hoc* (making the fishery or pond) *licet damnum faciat vicinis, non tamen facit injuriam*. Lib. 4, c. 44, p. 232 b.

Bracton also says that a person may have a servitude of conveying water out of another's soil and through another's soil¹ (*ex fundo alieno et per fundum alienum*) for the purpose of irrigating his land, and that he ought not to be hindered when acting according to the custom of the servitude; for instance, where he has a right to take the water at all times, and the owner of the soil will only permit him to do so at a particular time. Book 4, c. 41, p. 231 b. And Britton adds that the injured party may have an assize of nuisance in such case. Liv. 2, c. 30, § 1, p. 398, Nichols's ed. So, says Bracton, in c. 44, of a man having a right of pasture, who finds the way narrowed, and he is compelled to take a circuitous route to reach it. See Britton, liv. 2, c. 30,

¹ See the note on Obstructing and Diverting Water, *post*; and see also Dickinson v. Worcester, 7 Allen, 19; Tootle v. Clifton, 22 Ohio St. 247.

§ 4. And so of a way for wagons which he is not permitted to use. Ib.

We are also told by Bracton that, as there may be a wrongful nuisance in *faciendo*, so there may be in *non faciendo*, in the land of another; as where one is bound to fence and shut up, to cleanse and repair, and does not do it. And as there may be a wrongful nuisance in not doing a thing, so there may in not permitting a thing to be done; as where the owner of the soil will not permit any one to fence or repair. Book 4, c. 44, p. 232 b. So says Britton. Liv. 2, c. 30, § 7.

It is worthy of note that it appears from the first passage referred to from Bracton that the right to abate a nuisance, while yet fresh, is also one of the oldest rights given by the English law. (See also ib. p. 233, c. 44.) It might probably be traced far back of Bracton, and would likely prove to be one of the few instances of pure archaic law which have survived until the present time.

It is an interesting fact that in the time both of Glanvill and Bracton a nuisance was sometimes treated not merely in the light of, but as, an actual disseizin. The subject was considered by both of these writers under the title *De Assisa novæ disseysinæ*. Sometimes the assize of nuisance was used, and sometimes the assize of novel disseizin. If the defendant, for instance, caused water to overflow wholly upon the land of the plaintiff, this was thought rather a disseizin than a nuisance; but if the water rose only upon the defendant's land, and thereby merely incommoded the plaintiff, it was only a nuisance. If a stream ran between the lands of two persons, and part of the water flowed into the plaintiff's freehold, and part into the defendant's, both writs could be employed; the one for the disseizin,

and the other for the nuisance. And so there might be two assizes concerning the same act, "*et sic duæ erunt assisæ de uno facto*." Bracton, lib. 4, c. 45, p. 234 b. (Mr. Reeves carelessly renders the three last words "on account of the same land," which is as meaningless as it is incorrect. 1 Hist. English Law, p. 360, Finl. ed. See also 1 Nichols's Britton, p. 405, where this passage, taken from Bracton, is translated correctly.)

Even more prominence, relatively, is given to the subject of nuisance in the later treatise of Britton, though most of that which this writer presents is taken, often literally, from Bracton. And Britton entitles his chapter 30 of book 2, "*De Nusaunces*." He had previously stated that the law would not allow a person to do any thing tortious on his own land that would work annoyance to his neighbor; such as raising the water of his pond so as to flood his neighbor's land, or making a trench in his own soil whereby water is diverted from his neighbor, or the doing any thing whereby his neighbor may be prevented from using his seizin as freely and fully as he was wont. Liv. 2, c. 23, § 5, p. 363, Nichols's ed. And after stating the substantive part of the law in chapter 30, he proceeds in chapter 31 to consider of the remedy of nuisance, and in chapter 32 of the pleas permitted therein. The substance of Bracton is taken, with little addition or change, except in arrangement.

The law of servitudes is, of course, taken by Bracton from the Roman law; and it had even there the highest antiquity, servitudes being mentioned, and that of way, as to width, accurately defined, in the Twelve Tables. See Tomkins & Lemon's Gaius, p. 235. Bracton mentions at least three servi-

tudes derived from the civil law, — that of *iter* (passing on foot or horseback), that of *actus* (driving animals or vehicles through), and that of *aquæ ductus*. Book 4, c. 44, p. 232 b.

In later times the assize of nuisance became obsolete, being gradually superseded, as trespass and afterwards case grew into favor for the trial of injuries to property. See note on Trespasses upon Property, *ante*, p. 348.

Test of Public or Private Nuisance.

—Turning now from this historical view of the subject, it is proper to state that with the criminal aspect of nuisance we have here no concern; though it is important to observe that the criterion by which to determine whether a particular case is to be classed as a public or private nuisance depends, or seems to depend, upon the consideration whether it be indictable or not. See *Bamford v. Turnley*, *infra*; *Soltau v. De Held*, 2 Sim. N. s. 133, 144, 145; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 101.

There is this fact to be noticed, also, that a private nuisance must be created upon the premises (generally speaking) of the defendant; while a public nuisance may be created either upon the defendant's premises or upon the land of the public.

Locality. — Let us now ascertain, so far as the indefinite nature of the subject is capable, what constitutes a nuisance. The question depends upon a variety of considerations, aside from the nature of the act or omission, such as locality, time, and other circumstances, and will occupy the chief part of this note. Upon the important question of locality the principal case, *St. Helen's Smelting Co. v. Tipping*, has settled for the English courts a point about which there had previously been considerable fluctuation. In *Comyns's*

Digest, Action upon the Case for a Nuisance, C, occurs the following passage, given again in *Selwyn's N. P.* 1115 (10th ed.), and in *Gale, Easements*, 295: "An action upon the case does not lie upon a thing done to the inconvenience of another, as if a man erect a mill near to the mill of another, whereby the other loses part of his profit. 1 Rol. 107, l. 20; 11 H. 4, fo. 47 b. So it does not lie for a reasonable use of my right, though it be to the annoyance of another; as if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbor."

In *Hole v. Barlow*, 4 Com. B. N. s. 334, a case arose involving the second of the above propositions. The plaintiff brought an action against the defendant for a nuisance arising from the burning of bricks on the defendant's land near to the plaintiff's dwelling-house. The defendant contended that the thing complained of was not a nuisance, since it was done in a convenient place, and not with intent to injure or annoy the plaintiff. There was no question of prescription or reservation; and Mr. Justice Byles charged the jury that "to entitle the plaintiff to maintain an action for an injury of this nature, it is not necessary that the thing complained of should be injurious to health; it is enough if it renders the enjoyment of life and property uncomfortable. If you are satisfied from the evidence," he continued, "that the enjoyment of the plaintiff's house was rendered uncomfortable through the instrumentality of the defendant, that is sufficient to entitle the plaintiff to maintain this action. But that is subject to this observation, — that it is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an

offensive or noxious trade in the neighborhood that can bring an action. . . . I apprehend the law to be this, that no action lies for the use, the reasonable use, of a lawful trade in a *convenient and proper place*, even though some one may suffer annoyance from its being so carried on." This instruction was sustained by the judges upon a motion for a new trial.

So, too, in *Rich v. Basterfield*, 4 Com. B. 783, an action for a nuisance arising from smoke issuing from the defendant's chimney, Erle, J., in instructing the jury, added a similar qualification to the rule of *sic utere tuo*, that the right should be exercised in a reasonable place; but this was merely incidental.

The correctness of the decision in *Hole v. Barlow* came up for review in *Bamford v. Turnley*, 3 Best & S. 66. This, too, was an action for a nuisance arising from burning bricks upon the defendant's premises, near to the plaintiff's house. The Lord Chief Justice at *nisi prius* directed the jury, upon the authority of *Hole v. Barlow*, that if they thought that the spot was convenient and proper, and the burning of the bricks a reasonable use of the premises, the plaintiff could not recover. This instruction was affirmed by the Queen's Bench; and an appeal was taken to the Exchequer Chamber. Here the judgment of the court below was reversed, the Chief Justice dissenting. Williams, J., who delivered the judgment of the court, referring to the passage from Comyns above quoted, said that there was a want of precision in the use of the words "reasonable" and "convenient," which rendered its meaning obscure. He thought, however, that "convenient," instead of meaning suitable for the purpose of

carrying on the trade, as it had been understood in *Hole v. Barlow*, meant a place where a nuisance would not be caused to another. And *Jones v. Powell*, Palm. 536, 539, s. c. Hutt. 135, was referred to, where Hide, C. J., as translated, says: "A tan-house is necessary, for all men wear shoes; and nevertheless it may be pulled down if it be erected to the nuisance of another. In like manner of a glass-house; and they ought to be erected in places convenient for them." See Gale, *Easements*, 410 (Willes ed.), where the same interpretation of the term is given. See also *Beardmore v. Treadwell*, 3 Giff. 683, 699. The learned judge further said that the term seemed to be used in the same sense when applied to cases of public nuisance; and he referred to *Hawkins*, who says, "It seems to be agreed that a brew-house, erected in such an inconvenient place wherein the business cannot be carried on without greatly incommoding the neighborhood may be indicted as a common nuisance." 2 Hawk. P. C. 146, § 10 (Leach). "It should seem, therefore," the court proceed to say, "that just as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an inconvenient place, i.e., a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an inconvenient place, i.e., a place where it greatly incommodes an individual. If this be the true construction of the expression 'convenient' in the passage from Comyns's Digest, the doctrine contained in it amounts to no more than what has long been settled law, viz., that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher, brewer, and the like, notwith-

standing it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts in point of law to a nuisance to the neighboring house."

It was added that *Hole v. Barlow* was in conflict with *Walter v. Selfe*, 4 De G. & S. 315, 326, *infra*, where an injunction was granted in a similar case; and that, if that case were to be maintained, it would follow that, however ruinous the nuisance might be, the injured party would be without redress if a jury should deem it right to find that the place where the trade was carried on was proper and convenient for the purpose.

It was further held in this case that the decision could not be affected by the additional remark of the Lord Chief Justice, that there must be a reasonable use of the premises.

The same point arose again in *Cavey v. Ledbitter*, 13 Com. B. N. S. 470; and *Bamford v. Turnley* was followed. See also *Wanstead Board of Health v. Hill*, *ib.* p. 479.

It will be observed that there was no definition of a nuisance in *Bamford v. Turnley*; though it was plainly intimated that it was not every degree of annoyance, however small, that would be actionable. The principal case supplies the omission so far as such a thing is capable of being defined; the doctrine, as laid down by Mellor, J., *at nisi prius*, and affirmed in every stage of the litigation, being that the law does not regard trifling inconveniences; that every thing must be looked at from a reasonable point of view; that the injury from noxious vapors must be such as to visibly (sensibly?) diminish

the value of the property and the comfort and enjoyment of it; that in determining that question the time, locality, and all the circumstances should be taken into consideration; and that in districts where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand on extreme rights and bring actions in respect of every matter of annoyance, for that would be destructive to business in those places.

St. Helen's Smelting Co. v. Tipping shows that it is no defence that the plaintiff had notice of the existence of the nuisance when he located himself near it. See also the charge of Byles, J., in *Hole v. Barlow*, 4 Com. B. N. S. 334, 336; *Bliss v. Hall*, 4 Bing. N. C. 183; *Bamford v. Turnley*, 3 Best & S. 62, 70, 73; *King v. Morris*, 3 C. E. Green, 397. And justification of user must show that the offensive trade or occupation had been carried on through the period of prescription. *Elliotson v. Feetham*, 2 Bing. N. C. 184; *Bliss v. Hall*, 4 Bing. N. C. 183; *Flight v. Thomas*, 10 Ad. & E. 590.

Bodily Discomfort. — In the House of Lords a distinction was made by the principal case between injuries to property and mere personal (i.e., bodily) annoyances. Just what the distinction is it is probably impossible to say; and the distinction itself is difficult to apprehend. The meaning appears to be that the degree of harm in an action for personal discomfort must be greater than in an action for an injury to property. This may be a practical rule in a case where both kinds of injury appear; but how will it be where the action is for personal discomfort, and there is no proof of injury to property? How much discomfort must be endured?

In *Walter v. Selfe*, 4 De G. & S. 315, the plaintiffs sought and obtained an injunction against the defendant to restrain him from carrying into execution an intended burning of bricks so near to the plaintiff's premises as to occasion damage or annoyance to the plaintiffs, or damage to their messuage, coach-house, stable, wood-house and trees, shrubberies, &c. The Vice-Chancellor (whose judgment was affirmed on appeal, 4 De G. & S. 326) said that the plaintiffs were entitled to an unpolluted and untainted stream of air for the necessary supply and reasonable use of themselves and family; "meaning," said he, "by 'untainted' and 'unpolluted,' not necessarily air as fresh, free, and pure as at the time of building the plaintiffs' house, the atmosphere there was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence, — a phrase to be understood of course with reference to the climate and habits of England." The learned judge then proceeds to show that the intended business of the defendant would substantially interfere with this right. "That the process," he observes, "of manufacturing bricks by burning them on the defendant's land in the manner begun and now intended by him must communicate smoke, vapors, and floating substances of some kinds to the air is certain. I think it plain, also, from the relative positions of the two properties, that this smoke and these vapors and floating substances, the burning being to the westward of the defendant's own house, must wholly or to a great extent enter and become mixed with the air supplying the plaintiffs' house, and part at least of the garden or pleasure ground be-

longing to it, and this without being previously so dispersed or attenuated as to become imperceptible, or be materially impaired or diminished in force. I conceive that the plaintiffs' house, and at least part of its pleasure ground or garden, must generally or often, if the manufacture shall proceed, be subjected substantially, as far as the quality of the atmosphere is concerned, to the original and full strength of the mixture and dose thus produced. I speak without forgetting the trees that stand along the line of the boundary, and without assuming their continuance or the contrary. The question then arises whether this is or will be an inconvenience to the occupier of the plaintiffs' house as occupier of it, — a question which must, I think, be answered in the affirmative; though, whether to the extent of being noxious to human health, to animal health, in any sense, or to vegetable health, I do not say or deem it necessary to intimate an opinion; *for it is with a private, not a public nuisance, that the defendant is charged.* And both on principle and authority the important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people? And I am of opinion that this point is against the defendant. As far as the human frame, in an average state of health at least, is concerned, mere insalubrity, mere unwholesomeness, may possibly, as I have

said, be out of the case; but the same may perhaps be asserted of stied hogs, melting tallow, and other such inventions less sweet than useful. That does not decide the dispute; a smell may be sickening, though not in a medical sense. Ingredients may, I believe, be mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely. A man's body may be in a state of chronic discomfort, still retaining its health, and perhaps even suffer more annoyance from nauseous or fetid air for being in a hale condition. Nor, I repeat, do I think it incumbent on the plaintiffs to establish that vegetable life or vegetable health, either universally or in particular instances, is noxiously affected by the contact of vapors and floating substances proceeding from burning bricks; for, as I said, they have, I think, established that the defendant's intended proceedings will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiffs' house, whatever their rank or station, whatever their age, whatever their state of health." See also, as to brick-making, *Beardmore v. Tredwell*, 3 Giff. 683, where the defendants were compelled to remove; *Wanstead Board of Health v. Hill*, 13 Com. B. N. S. 479, where it was held that brick-making was not necessarily a noxious or offensive business within the Public Health Act; *Huckenstine's Appeal*, 70 Penn. St. 102, to the same effect; *Cleeve v. Mahony*, 9 Week. Rep. 882, where the annoyance being but temporary, an injunction was refused; also *Attorney-Gen. v. Cleaver*, 18 Ves. 219.

In an action brought against a gas-company for a nuisance arising from unwholesome and annoying odors, gases,

and stench, by which the health and comfort of the plaintiff and his family had been affected, the court instructed the jury that if they should assess the damages on the basis of noisome and disagreeable smells in the air and water, there must be some real, substantial damage to the plaintiff in this respect. "But by this," said the learned judge, "I do not mean that he shall have had physician's or nurse's bills to pay, or have been put to any actual expense, but he or his family must have been rendered more uncomfortable than persons *ordinarily are who are similarly situated* in all things, except as to the annoyance complained of. If he has been so rendered uncomfortable, he has sustained an actual, substantial damage." Exception having been taken to the charge, it was said by a majority of the Supreme Court that the part of the charge italicized might have led the jury into a mere comparison of the situation of the plaintiff with that of his neighbors, — into an inquiry simply whether any difference was perceptible; and the exception was sustained. *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392.

The subject of nuisances arising from smoke, noxious vapors, and noise came recently before Lord Romilly, M. R., in *Crump v. Lambert*, Law R. 3 Eq. 409. In this case an injunction was granted to restrain the issuing of smoke and effluvia from a factory chimney, and the making of noise in the factory, although the building was situated in a manufacturing town; the evidence proving that the smoke, effluvia, and noise were a material addition to previously existing nuisances. The learned judge said that he considered it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapor, that noise alone, that offensive

vapors alone, although not injurious to health, might severally constitute a nuisance to the owner of adjoining or neighboring property; and that, if they did, substantial damages might be recovered at law, and that equity, if applied to, would restrain the continuance of the nuisance (or the causing of it, as was decided in *Walter v. Selfe*, *supra*) in all cases where substantial damages could be recovered at law. *Elliotson v. Feetham*, 2 Bing. 134; *Soltan v. De Held*, 2 Sim. N. S. 133, cases of noise alone.

Having referred to the doctrine of *Walter v. Selfe* with approval, and stating that it had been adopted in *Soltan v. De Held*, *supra*, and in the principal case, Lord Romilly said: "The real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence. This is what is established in *St. Helen's Smelting Co. v. Tipping*; and that is the question to be tried in the present case." See also *Sparhawk v. Union Pass. Ry. Co.*, 54 Penn. St. 401, 427; *Cleveland v. Citizens' Gas Co.*, 5 C. E. Green, 201; *Babcock v. New Jersey Stock Yard Co.*, *ib.* 296; *Meigs v. Lister*, 8 C. E. Green, 199; *Mulligan v. Elias*, 12 Abb. Pr. N. S. 259; *Aldrich v. Howard*, 8 R. I. 246; *Cooper v. Randall*, 53 Ill. 24; *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241, 248; *Fay v. Whitman*, 100 Mass. 76; *Emery v. Lowell*, 109 Mass. 191; *Francis v. Schoellkopf*, 53 N. Y. 152; *Ball v. Ray*, Law R. 8 Ch. 467; *Gaunt v. Fynney*, 26 Law T. N. S. 308; s. c. 27 *ib.* 569.

Mental Discomfort. — In *Sparhawk v. Union Pass. Ry. Co.*, 54 Penn. St. 401, the plaintiffs instituted a proceeding to enjoin the defendants from running their horse-cars on Sunday, on the

ground that they were being deprived of enjoying the Sabbath as a day of rest and of religious exercise by the acts complained of. The bill was dismissed; the court holding that the case did not come within the principle of *Walter v. Selfe* and the other cases above referred to. The distinction was that religious meditation and devotional exercises resulted from sentiments not universal, but were peculiar to individuals; and injury by disturbance could not be measured by any standard applicable to the privation of ordinary comfort. The disturbance was only mental; and human tribunals could not tell any thing about the effect on the mind of mere noise. The court thought the rule was that the injury must be one that would affect all a like who come within the influence of the disturbance. "It must be something about the effects of which all agree; otherwise that which might be no nuisance to the majority might be claimed to deteriorate property by particular persons. Noises which disturb sleep, bodily rest, — a physical necessity, — noxious gases, sickening smells, corrupted waters, and the like, usually affect the mass of the community in one and the same way, and may be testified to by all possessed of their natural senses, and can be judged of by their probable effect on health and comfort; and in this way damages may be perceived and estimated. Not so of that which only affects thought or meditation."

The above distinctions were based upon *Owen v. Henman*, 1 Watts & S. 548, and *First Baptist Church v. Utica & S. R. Co.*, 5 Barb. 79. The first of these cases was an action by one church-member against another for disturbing the plaintiff (during religious exercise in the church) by making loud noises in

singing, reading, and talking. It was held that the action could not be maintained. "In the first place," said the court, by Sergeant, J., "the injury alleged is not the ground of an action. He [the plaintiff] claims no right in the building, or any pew in it, which has been invaded. There is no damage to his property, health, reputation, or person. He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse, or any other mental exercise (and it must be the same whether in a church or elsewhere), by the noises, voluntary or involuntary, of others, the field of litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature; it is altogether of a spiritual character, for which no action at law lies." See *State v. Linkhaw*, 69 N. Car. 214; s. c. 1 Green's C. L. Cas. 288.

As to public nuisances, it was formerly a matter of doubt whether they could be made the subject of an action for damages,—a doubt which seems to have arisen from a misapprehension of the case of *Iveson v. Moore*, Comyn, 58; s. c. 1 Ld. Raym. 486; Holt, 16. There the judges were divided in opinion; two of them thinking that the judgment should be for the plaintiff, and two, including Lord Holt, thinking it should be for the defendant. But, as has been pointed out in *Soltau v. De Held*, 2 Sim. N. s. 133, 145–147, this was not because any doubt was entertained whether an individual could maintain an action in respect of a public nuisance for a special damage to himself, but because it was thought that the special damage was not laid with sufficient accuracy and minuteness. And it appears by a note to the report by Lord Ray-

mond that upon a reargument it was held that the special damage was well laid. Several other cases are reviewed in *Soltau v. De Held*, and the conclusion reached by the learned judge was that that which is a public nuisance may also be a private nuisance to a particular person by inflicting upon him some special or particular damage; and that in such cases the individual may have his remedy either by an action at law or by a bill in equity.

This is the doctrine also of the American courts. *Milbau v. Sharp*, 27 N. Y. 612; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 101; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Enos v. Hamilton*, 27 Wis. 256; *Houck v. Wachter*, 34 Md. 265.

If, then, the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a highway, or a canal, or a public landing-place, or a common watering-place on a stream or pond of water; in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no ground of action in favor of an individual. *Wesson v. Washburn Iron Co.*, *supra*, *Bigelow*, C. J., and many cases there cited.

But it will be found that in all the cases this negative principle has been applied to hindrances or obstructions to the exercise of rights which are common to every person in the community, and that it has never been extended to cases where damage has been done to private property, or where the health of individuals has been injured, or their peace and comfort materially impaired, however numerous or extensive may be the in-

stances of discomfort, inconvenience, and injury to persons and property thereby occasioned. *Ib.* The injury to private property or to health and comfort is not merged in the public wrong, so as to take away the right of private and personal redress. *Ib.*

The above case of *Wesson v. Washburn Iron Co.* was a case of the kind just indicated. The action was brought (and maintained) to recover damages for a nuisance to a dwelling-house, caused by carrying on works and operating machinery in the vicinity, by which the air was filled with smoke and cinders, and rendered offensive and injurious to health, and the house itself shaken so as to be uncomfortable for occupation; though all persons owning property in the vicinity had sustained like injuries from the same cause.

As to what constitutes special damages within the rule of public nuisances, *Stetson v. Faxon*, 19 Pick. 147, is an instructive case. The defendant had erected in Boston a warehouse, projecting several feet into the street, and beyond the plaintiff's warehouse (which stood near, on the line of the street), whereby the plaintiff's warehouse was obscured from the view of passengers, and travel was diverted to a distance from it; and in consequence it was rendered less eligible as a place of business, and the plaintiff was obliged to reduce his rent. It was held that the plaintiff had suffered special damage, and might recover. The opinion of the court by Putnam, J., contains an exhaustive review of the cases, beginning with one in the Year-Book, 27 H. 8, pl. 10, p. 27, where Fitzherbert, J., in opposition to Baldwin, C. J., said that the man who makes the nuisance is punishable in the leet, and not by action, "unless it be where a man has greater

hurt or incommmodity than every other man had." (But this is not always necessary. *Wesson v. Washburn*, *supra*. The judge probably meant simply that where all were alike incommoded, in the case of a public nuisance, individuals could not sue; and so it is put in Coke, Litt. 56 a. See also *Williams's Case*, 5 Coke, 73; *Holman v. Townsend*, 13 Met. 297.) The following cases were also referred to: *Paine v. Patrich*, Carth. 194, in which Holt, C. J., said that if a highway be so stopped that a man is delayed a little while on his journey, by reason whereof he is damnified, or some important affair neglected, that is *not* a special damage. (But in the case from the Year-Book, above cited, Fitzherbert, J., says that where one makes a ditch across a highway, and I am travelling in the night, and with my horse fall into the ditch, and so have great damage and inconvenience, I shall have an action against him who made the ditch; a rule finding many exemplifications in modern times.) *Hubert v. Groves*, 1 Esp. 148, was also referred to, and the ruling of Lord Kenyon that no special damage had been alleged was criticised, and said to be greatly shaken by *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281. (See also *Greasly v. Codling*, 2 Bing. 263; *Pierce v. Dart*, 7 Cowen, 609, 611; *Lansing v. Wiswall*, 5 Denio, 213, 218; *Farrelly v. Cincinnati*, 2 Disn. 516, 529.) Other cases were cited; *Maynell v. Saltmarsh*, 1 Keb. 847, where an action was brought for erecting posts in a highway through which the plaintiff was wont to pass to and from his close, and it was alleged that his corn was spoiled in consequence of the obstruction; and it was held that this was special damage. *Chichester v. Lethbridge, Willes*, 71, where a high-

way was so obstructed that the plaintiff was obliged to go by a longer and more difficult way to and from his close; and it was held that the action lay. So in *Hart v. Basset*, T. Jones, 156, and *Greasly v. Codling*, 2 Bing. 263, similar cases. *Baker v. Moore*, cited 1 Ld. Raym. 491, where, by reason of an obstruction across a highway, the plaintiff's tenants left his houses, and he lost the profits of them; which was accounted special damage. *Lyme Regis v. Henley*, 1 Bing. N. C. 222, where Park, J., in delivering judgment, said, "It is clear and undoubted law that wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage."

Cases concerning special damage arising from public nuisances have been very numerous in modern times. (Remedies from obstructions to highways and streams are often regulated by statute. These cases we do not consider. So, too, many of the cases are actions for negligence, the liability of the defendant depending upon proof of such fact. These cases will be considered hereafter, under Negligence. Actions for nuisance, properly speaking, stand irrespective of negligence.) In *Blood v. Nashua & Lowell R. Co.*, 2 Gray, 137, it was held that a railroad company which had built a bridge across a stream were liable for the damage thereby occasioned to the owners of a saw-mill above by the obstruction of the stream so as to prevent the water from passing from his mill as freely as it had done previously. But it was also held that they were not liable for the damage suffered by the plaintiffs by being impeded and put to increased expense in getting logs up the stream to his mill, whether the stream were navi-

gable or not. The distinction taken by the court was this: that, if the stream was not navigable, the plaintiffs had no right to use it (as they had done) for boats and rafts; but, supposing it to be navigable for boats and rafts, the obstruction would then be a public and not a private nuisance. It might affect those near the obstruction much more than the rest of the public; but the damage sustained by those near it differed in degree only, not in kind.

This distinction, like the distinctions generally between kind and degree, is extremely subtle, if not unsatisfactory. Suppose the defendant's factory is a public nuisance, and the injury to property and health varies in degree according to the distance and direction of the various dwelling-houses in the vicinity; will not any and all who suffer a material damage, though greater only in degree (if that means any thing) than that suffered by the community generally, be entitled to recover for it? They certainly will be according to *Soltau v. De Held*, *supra*, and *Francis v. Schoellkopf*, 53 N. Y. 152, both of which were decided upon just such considerations. See also the example put by Putnam, J., in *Stetson v. Faxon*, *supra*. "Suppose," said he, "a ditch to be cut across Washington Street at the Roxbury line; shall every holder of real estates and of shops in that street between Cornhill and Roxbury maintain an action for special damages to their estates for that nuisance? The proposition would seem to be absurd. But it would not follow that because some owners of shops who lived a mile from the obstruction might not have special damages, those who lived near to it might not. *Let those who suffer have their actions.*" The doctrine of *Blood v. Lowell & Nashua R. Co.* is somewhat criticised in *Enos v. Hamil-*

ton, 27 Wis. 256, also. The decision may perhaps be sustained upon its facts; it is one of those cases which come within debatable ground, where the line between liability and non-liability is extremely difficult of ascertainment. It does not stand upon the clear ground by which temporary obstructions to a highway are permitted; for in the latter case, the highway being used by everybody, there is indeed an inconvenience "common to all:" Holmes v. Townsend, 13 Met. 297; Houck v. Wachter, 31 Md. 265; while in the case of an obstruction of a small stream, "navigable" only for rafts and small boats, the annoyance is common only to the very few who are engaged in business upon the stream. And *quære* if the meaning of the term "common to all" is "common to all of a class," however small?

It is, however, to be observed of *Blood v. Lowell & Nashua R. Co.*, that the obstruction arose from a bridge, erected under the authority of the charter of a corporation of a *quasi* public character, and of great use to the public. In this aspect the case is much like that of the establishment of fisheries and ponds, mentioned above from Bracton.

The above distinction between kind and degree in a case of public nuisance is also taken (but unnecessarily) in *Venard v. Cross*, 8 Kans. 248, based on a passage in the note to *Ashby v. White*, 1 Smith's L. C. 364 (5th Am. ed.).

In *Enos v. Hamilton*, *supra*, there was a prolonged obstruction of a navigable stream by logs, caused by a private individual, which resulted in serious damage to the plaintiff; and he was allowed to recover for the damage sustained.

In *Winterbottom v. Derby*, Law R. 2 Ex. 316, the plaintiff brought an

action for an obstruction of a public footway, "whereby the plaintiff was on divers days hindered and prevented from passing and repassing over and along the said footway, and using the same, and was obliged to incur, and did incur, on divers days, great expense in and about removing the said obstructions, in order that he might, and before he could, pass and repass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same." It appeared in evidence that the plaintiff, in company with some friends, went to a way called Park Lane with the intention of traversing the footway in question. He found it obstructed, and was delayed whilst some persons under his direction, and at his expense, removed the obstruction. On other occasions he renewed the attempt to use the way, but was either obliged to turn back each time or else was delayed while the obstructions were being removed. It was held that this was not evidence of special damage. As to the expense of the removal of the obstruction, the Chief Baron said the plaintiff had only incurred an expense such as any one who might have gone to remove the obstruction would have incurred. "The damage," said he, "is in one sense special, but it is in fact common to all who might wish, by removing the obstruction, to raise the question of the right of the public to use the way. Upon the authorities, then, and especially relying on *Iveson v. Moore* [1 Ld. Raym. 486], and *Ricket v. Metropolitan Ry. Co.* [5 Best & S. 186; s. c. 34 Law J. Q. B. 257], I am of opinion that the true principle is, that he and he only can maintain an action for an obstruction who has sustained some

damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could, would in effect be to say that any of the Queen's subjects could."

Upon the authority of this case, among others, *Houck v. Wachter*, 34 Md. 265, was decided. This was also an action for the obstruction of a public way. The averment of special damage was in these words: "And the plaintiff says that he had made a journey with his said horses and wagons from his said farm, through and over said highway, to his market-town, to wit, Frederick City, in said county, and on his said journey was returning to his said farm when he met the said obstruction, and was withheld by the defendant from removing the same, so that he could not pass, and was obliged to proceed to his said farm from his said market-town by a very circuitous route; and the plaintiff says that, at divers other times, he was greatly hindered and delayed, and put to great loss of time and money, by reason of being compelled, by means of said obstruction, to go and return, pass and repass to and from his said farm by a very circuitous road, and of much greater distance to the said market-town, and to mills and said court-house, than he otherwise would, and of right ought to have done with his said horses, wagons, and carriages, laden as aforesaid; and by means of shutting up and closing said highway wrongfully prevented him, the said plaintiff, from driving and conducting his said horses, wagons and carriages, laden as aforesaid over and along said highway, as he was used and accustomed, and of right ought." It was held that this was not a proper

allegation of special damage. The particular instance of injury alleged was said to be simply an inconvenience which was common to the rest of the community, since all were obliged to go by a longer or more circuitous route.

The case seems to be different, however, where a highway is of peculiar use to a person, as by being his only means of getting (by team) to certain of his lands. Thus in *Venard v. Cross*, 8 Kans. 248, the plaintiff complained that the defendant had, by raising the water of a dam, flooded, and rendered impassable a highway, which was his only means of ingress and egress to part of his farm; and it was held that this constituted a valid cause of action. "It is not," said the court, "that he uses this highway more than others, but that the use is of a particular necessity to him, affording him an outlet to his farm. It is to him a use and benefit differing from those enjoyed by the public at large."

Who liable.—In the case of leased premises the action should be brought against the landlord if the nuisance was in existence when the premises were let, unless it has been aggravated by the tenant; if not, the action should be against the tenant. *Rich v. Basterfield*, 4 Com. B. 783; *Russell v. Shenton*, 3 Q. B. 449; *Bishop v. Bedford Charity*, 1 El. & E. 697; *Fiaber v. Thirkell*, 21 Mich. 1. So, too, though the person be not a tenant, if he be not strictly the agent or servant of the owner, the latter will not be liable for a nuisance created by such party, unless the owner be himself in possession also. *Rich v. Basterfield*, *supra*; *Cuff v. Newark, &c.*, R. Co. 6 Vroom, 17. See also *Hilliard v. Richardson*, *post*, and note.

But a landlord is liable for nuisances

of a permanent character produced by his tenant, if he might have terminated the tenancy therefor. Continuing the tenancy is regarded as equivalent to a reletting of the premises; and it is immaterial whether the landlord has had notice of the nuisance or not. *Gandy v. Jubber*, 10 Jur. N. S. 652; S. C. 5 Best & S. 78; *ib.* (in error) 485.

In New York excavations under the sidewalk in a public street are held unlawful without express legislative or municipal authority; and therefore, if injury result from them, though without negligence on the part of the owner of the adjoining premises, he is liable. *Congreve v. Morgan*, 5 Duer, 495; S. C. 18 N. Y. 79. See also *Davenport v. Ruckman*, 10 Bosw. 20; *Irwin v. Fowler*, 5 Rob. 482; *Ellis v. Sheffield Gas Co.*, 2 El. & B. 767.

In Michigan, however, such excavations are not *per se* unlawful, and the liability of the defendant must therefore depend upon the condition and state of repair of the premises, and also upon the question who is bound to keep them in repair. It was accordingly held in *Fisher v. Thirkell*, 21 Mich. 1, that a landlord owning premises in front of which he had made an excavation (under the sidewalk), which was properly constructed and in good condition when the premises were leased, was not liable for an injury which the plaintiff sustained by reason of a scuttle being out of repair; the liability to repair, in the absence of stipulation to the contrary, being upon the tenant. See also *Payne v. Rogers*, 2 H. Black. 350; *Lowell v. Spaulding*, 4 Cush. 277; *Chauntler v. Robinson*, 4 Ex. 163; *Cheetham v. Hampson*, 4 T. R. 318; *Todd v. Flight*, 9 Com. B. N. S. 377; *Offerman v. Starr*, 2 Barr, 394; *Bears v. Ambler*, 9 Barr, 193; *Owings v. Jones*,

9 Md. 108; *Smith v. Phillips*, 8 Phila. 10.

If the action be brought against the grantee of the party who created the nuisance, it is necessary to prove notice to him of the nuisance before the commencement of the suit, so that he may have an opportunity to abate it. This was decided so long ago as in *Penruddock's Case*, 5 Coke, 101. See *Winsmore v. Greenbank*, *ante*, p. 328; *McDonough v. Gilman*, 3 Allen, 264; *Dodge v. Stacy*, 39 Vt. 560; *Pillsbury v. Morse*, 44 Maine, 154; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143; *Beavers v. Winner*, 1 Dutch. 96, 101; *Conhocton Stone Road v. Buffalo, &c., R. Co.*, 51 N. Y. 573; *West v. Louisville, &c., R. Co.*, 8 Bush. 404. See also *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Walter v. Wicomico Co.*, 35 Md. 385.

One who has made a conveyance of the premises upon which the nuisance exists may still be liable, as if he derives a benefit from the business from which it proceeds, or if he has sold with warranty of the continued use of the premises with the nuisance. *Hause v. Cowing*, 1 Lans. 288.

A municipality is liable for injuries resulting from such obstructions or nuisances in the street as the authorities are bound to remove. Thus, in *Ayer v. Norwich*, 39 Conn. 376, the plaintiff sued the city of Norwich for an injury which she had sustained by being thrown from her carriage, her horse (being a horse of ordinary gentleness) having taken fright from a decorated tent which stood within the limits of the highway; and she was held entitled to recover. See also *Dimock v. Suffield*, 30 Conn. 129; *Morse v. Richmond*, 41 Vt. 443; *Bartlett v. Hooksett*, 48 N. H. 18; *Foshay v. Glen Haven*, 25 Wis. 288.

There is, however, a conflict as to the proper construction of the statute relating to such cases. In Massachusetts the municipality is not liable. *Keith v. Easton*, 2 Allen, 552; *Kingsbury v. Dedham*, 13 Allen, 186; *Cook v. Charlestown*, 98 Mass. 80.

A thing authorized by statute, or by due municipal license, is not a nuisance so long as it is used in conformity with the act of the legislature or the license. *First Baptist Church v. Utica & S. R. Co.*, 6 Barb. 813; *Saltonstall v. Ban-*

ker, 8 Gray, 195; *Call v. Allen*, 1 Allen, 137.

But if there be an abuse of the legislative or municipal authority (*Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Ryan v. Copes*, 11 Rich. 217; *Evansville R. Co. v. Dick*, 9 Ind. 433; *Montgomery v. Hutchinson*, 13 Ala. 573), or if the business be conducted negligently (*Mazetti v. New York & H. R. Co.*, 3 E. D. Smith, 98; *Call v. Allen*, 1 Allen, 137; *Ryan v. Copes*, 11 Rich. 217), the protection is lost.

DANGEROUS ANIMALS AND WORKS.

MAY v. BURDETT, leading case.

Note on Dangerous Animals and Works.

Injuries by animals.

Foreign law.

Injuries committed *contra* or *secundum naturam*.

Injuries by domestic animals.

Fences. Escape of animals.

Killing another's animals. Detaining strays.

Bringing dangerous things upon a man's land.

STEPHEN MAY AND SOPHIA, his Wife v. BURDETT.

(9 Q. B. 101. Queen's Bench, England, Trinity Term, 1846.)

Keeping Ferocious Animals. — A person who keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by such animal, without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities.

Quære, whether to an action on the case for injury caused as above stated, it would be a defence that the injury was occasioned solely by the wilfulness of the plaintiff, after warning.

CASE. The declaration stated that defendant, "before and at the time of the damage and injury hereinafter mentioned to the said Sophia, the wife of the said Stephen May, wrongfully and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined: which said monkey, whilst the defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the 2d of September, 1844, did attack, bite, wound, lacerate, and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame, and disordered, and so remained

and continued for a long time, to wit, from the day and year last aforesaid, to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey, so attacking, biting, wounding, lacerating, and injuring her as aforesaid, the said Sophia has been greatly injured in her health," &c.

Plea, not guilty. Issue thereon.

On the trial, before Wightman, J., at the sittings in Middlesex, after Hilary Term, 1845, a verdict was found for the plaintiff with 50*l.* damages. *Cockburn*, in the ensuing term, obtained a rule to show cause why judgment should not be arrested.

In last Hilary Term¹ *Watson* and *Couch* showed cause. The only question is, whether the declaration is bad because it does not state that the defendant kept the animal negligently. The present form is consistent with the law and the precedents. The wrong on which an action of this kind proceeds is the knowingly keeping an animal accustomed to do mischief. "In evidence to an inquest it was agreed by Fitzherbert and Shelley, that if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing; otherwise is it, if he have notice of the quality of the dog." Anonymous, Dyer, 25 *b*, pl. 162, *placitum* in Dyer. "An action upon the case will lie for keeping a dog used to bite sheep, and which has killed sheep belonging to the plaintiff; but in such case it must be proved that the defendant knew that he would bite sheep." Bull. N. P. 77. The author cites *Smith v. Pelah*, 2 Stra. 1264, and *Jenkins v. Turner*, 1 Ld. Raym. 109, where the gist of the action is stated in the same manner. And he (citing *Rex v. Huggins*, 4 Ld. Raym. 1574, 1583): "There is a difference between things *feræ naturæ*, as lions, bears, &c., which a man must keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature; in the latter case the owner must have notice; in the former an action lies without notice." The Mosaic law, Exodus xxi. 28, 29, 36, referred to in the margin of the *placitum* in Dyer, agrees with ours. The wrong consists in keeping the animal, even though it be *mansuetæ naturæ*, if the owner knows that it has been used to do mischief, and if injury

¹ January 13, 15, and 26, 1846. Before Lord Denman, C. J.; Patteson, Coleridge, and Wightman, JJ.

results from the keeping. The *scienter*, not negligence in keeping, constitutes the tort. The doctrine stated in *Dyer* is adopted in *Com. Dig. Action upon the Case for Negligence (A 5)*; and *Comyns* observes: "It is sufficient to say, *canem ad mordendum consuetum scienter retinet*." [COLERIDGE, J. You cannot suppose that that is meant as giving the complete form of a declaration.] In 1 *Vin. Abr.* 234, tit. Actions [Mischief by dogs, &c.] (H), pl. 3, it is said: "If a man has a dog that kills sheep, the master of the dog being ignorant of such quality, the master shall not be punished for this killing; but, if he has notice of such quality, it is otherwise." Declarations averring misconduct in the keeping of a horse or dog or a bull, but omitting the *scienter*, have been held insufficient. *Scetchet v. Ellham*, *Freem. C. B.* 534; *Mason v. Keeling*, 12 *Mod.* 332; *s. c. Ld. Raym.* 606; *Bayntine v. Sharp*, 1 *Lutw.* 90. See *Buxendin v. Sharp*, 2 *Salk.* 662. The case of *Michael v. Alestree*, *Lev.* 172, cited in moving for the present rule, is no authority to the contrary. There a *scienter* was held unnecessary; but the complaint was not of a mere improper keeping, but that the defendant, by his servant, carelessly drove ungovernable horses for the purpose of breaking them in a public place. [LORD DENMAN, C. J. He brought the horses to a place where people were.] The case of keeping a vicious animal is analogous to those in which persons merely keeping dangerous weapons or instruments have been held liable if mischief resulted from their being kept. *Dixon v. Bell*, 5 *M. & S.* 198; *Townsend v. Wathen*, 9 *East*, 277. In *Blackman v. Simmons*, 3 *Car. & P.* 138, the mere keeping a dangerous bull, with knowledge, appears to have been considered a ground of action, mischief having ensued. The same conclusion may be drawn from *Curtis v. Mills*, 5 *Car. & P.* 489. [PATTESON, J. It does not appear, in the present case, that the monkey may not have been chained up, and have unexpectedly escaped. But you say that, if a party keeps such an animal, chained, he runs the risk of its breaking loose.] That is the law. [PATTESON, J. Suppose it had been confined in a cage, and the plaintiff's wife had put her hand in.] Actual misconduct in the plaintiff might be a defence, under the general issue or a special plea.¹ The present form of

¹ Patteson, J., alluded here to the case of a person going into a place where he had no business to be at the time, and being there bitten by a dog; probably *Brock v. Copeland*, 1 *Esp.* 203.

declaration agrees with the precedent in 2 Chitty on Pleading, 430 (7th ed.). [PATTERSON, J. Mr. Chitty observes that, before the new rules prohibiting more than one count on the same transaction, it was usual to add other counts, one of which was for not keeping the dog properly secured.] A form like the present was used in *Thomas v. Morgan*, 2 Cro., M. & R. 496; s. c. 5 Tyr. 1085. The older precedents are similar: Reg. Brev. 110 *b*, cited, and relied upon by the court, in *Cropper v. Matthews*, 2 Sid. 127 (where Reg. Brev. 108 is also cited, but this seems a mistake). See Reg. Brev. 111 *a*; Rest. Ent. Plac. 40, pl. 56; Morg. Prec. 443; 1 Lil. Ent. 29; 8 Wentw. Pl. 437. (*Watson* also stated that the present form accorded with manuscript precedents of the late Mr. Serjeant Williams and Mr. Justice Richardson, and with precedents extracted by himself from the books of Mr. Justice Bayley.) The averment here that the defendant knew it to be dangerous "to allow the said monkey to be at large" is not material, and does not render it necessary to show that the monkey was, in fact, allowed to be at large.

Cockburn and *Pickering*, contra. The question in this case is important, inasmuch as the plaintiff assumed that it is illegal to keep a destructive animal, as is done at the garden of the Zoölogical Society and other menageries, and that, however carefully such animal may be kept, yet if it escapes without any fault on the owner's part and does damage, or even if an incautious person be hurt, or an excessively timid person terrified by the animal while under proper restraint, the owner is answerable. No decision has gone that length; and, in the present case, the declaration alleges nothing inconsistent with a strictly proper keeping. In Com. Dig. Action upon the Case for Negligence, the division (A 5) referred to on the other side is headed, "For a neglect in taking care of his dog, horse, cattle," &c., and the first instance given is, "If a man ride an unruly horse in Lincoln's Inn Fields (or other public place of resort), to tame him, and he break loose, and strike the plaintiff;" on which point *Michael v. Alestree*, 2 Lev. 172, s. c. 1 Ventr. 295, 3 Keb. 605, is cited. In Ventr's report of that case, the court is stated to have said: "Lately in this court an action was brought against a butcher, who had made an ox run from his stall and gored the plaintiff; and this was alleged in the declaration to be in default of penning him." And in Keble's report of *Michael v. Alestree*, 3 Keb. 605, reference is

made to a case "where a monkey escaped and did hurt, by default of the owner." Neglect, and not merely having such animals, was essential to the action in each of the cases. This remark applies also to the *placita* in the division of Com. Dig. before cited, as to a mad bull, and the case in which, if a dog has once bitten a man, and the owner, having notice, keeps him "and lets him go about or lie at his door," a person bitten by the dog may bring an action. *Smith v. Pelah*, 2 Stra. 1264. It is true that the *scienter* is also a necessary averment; but that is because knowledge is an ingredient of negligence; and for that reason it is laid down in Com. Dig. Pleader (2 P. 2), that "a declaration for a neglect in keeping his dog," &c., "must say that the defendant was *sciens* of the mischievous quality." In *Brock v. Copeland*, 1 Esp. 203, where the declaration stated "that the defendant knowingly kept a dog used to bite," and by which the plaintiff was bitten, Lord Kenyon ruled that the action would not lie. He said "that every man had a right to keep a dog for the protection of his yard or house; that the injury which this action was calculated to redress was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public; that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up." The only plea there was not guilty. [COLERIDGE, J. "Not guilty" then had not the same effect as the plea of not guilty in modern times.] There is no instance of a special plea that the injury done by the animal resulted from the plaintiff's own negligence. In the passage cited on the other side from the judgment in *Rex v. Huggins*, 2 Ld. Raym. 1583, the question discussed is, in what cases notice of the mischievous quality of the animal is essential to the owner's liability; and the difference stated on that point is, whether the animal be originally *mansuetæ* or *feræ naturæ*. But in neither case does it appear that liability attaches without any negligence in the owner. Even where death has ensued, the court says: "If the owner have notice of the mischievous quality of the ox, &c., and he uses all proper diligence to keep him up, and he happens to break loose, and kills a man, it would be very hard to make the owner guilty of felony. But if through negligence the beast goes abroad, after

warning or notice of his condition, it is the opinion of Hale that it is manslaughter in the owner. And if he did purposely let him loose and wander abroad, with a design to do mischief; nay, though it were but with a design to fright people and make sport, and he kills a man, it is murder in the owner." In Justinian's Institutes, b. 4, tit. 9, it is said (after distinguishing between damage done by animals which are naturally ferocious, and by those which act against their nature in doing damage), "*Si ursus fugit a domino et sic nocuit, non potest quondam conveniri, quia desiit dominus esse, ubi fera evasit.*" In that case there is no longer a power of control, and, therefore, no room for negligence nor any ground for liability. A monkey is naturally a wild animal; and there is no averment in this case that it was tame when the mischief happened. If, therefore, it escaped without the owner's fault, and did damage, he would not be liable. Thus it is said, in Com. Dig. Action upon the Case for Negligence (A 5), that, "if a man has a tame fox, which escapes and becomes wild, and does mischief, the owner shall not answer for the damage done afterwards." See 1 Ld. Raym. 606 (in *Mason v. Keeling*). If, indeed, he wilfully or carelessly set the animal at liberty, he would be liable, according to the *dictum* of Lord Ellenborough in *Leam v. Bray*, 3 East, 593, 595. "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass." The principle by which cases like this must be governed is, that a man may do on his own land what he thinks proper, so that he does not thereby interfere with the rights of others. A man may set dog-spears in his own ground, even without giving notice to others. *Jordin v. Crump*, 8 M. & W. 782. So he may keep a dangerous animal there; and the act being legal, he is not answerable for a misfortune which results from it, unless caused by misconduct of his own. Here it is consistent with all the averments that the plaintiff and not the defendant may have been in fault.

The course of precedents, at least since the date of the older entries cited on the other side, has not been uniform; and (as is stated in Chitt. Pl. 430, 7th ed.) before the new rules it was usual to draw a separate count averring negligence in not keeping the animal secured. *Jones v. Perry*, Esp. N. P. C. 482, and *Hartley v. Harriman*, 1 B. & Ald. 620, afford instances. In the

case of the butcher cited in Ventris's reports of *Michael v. Alestreet*, 1 Vent. 295, negligence was charged; and the same averment appears to have been made in the action for mischief done by a monkey, referred to in Keble's report of the same case, 3 Keb. 650. In *Mason v. Keeling*, 1 Ld. Raym. 606, s. c. 12 Mod. 382, where the validity of the declaration was discussed on demurrer, the court alleged that the dog attacked the plaintiff "*pro defectu debitæ curæ et custodiæ*" by the defendant, who permitted the dog "*libere et ad largum ire*." In *Blackman v. Simmons*, 3 Car. & P. 138, negligence was expressly averred. And in *Curtis v. Mills*, 5 Car. & P. 489, the materiality of such an allegation appears from the stress laid by Tindal, C. J., on the question whether or not the dog was placed in such a situation that by common care the plaintiff might have avoided him. A precedent, in 8 Went. Pl. 581, of a declaration for mischief done by unruly rams, belonging to the defendant, alleges not only a *scienter*, but negligence in permitting them to go at large. Even in the present case the framer of the declaration seems to admit that the owner, to be liable, must have contributed, by some neglect or permission, to the animal's escape, since the court avers knowledge by him "that it was dangerous and improper to allow the said monkey to be at large and unconfined;" in which respect it unquestionably departs from the precedents cited on the other side. *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, &c.

It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and

that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be, that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register and ending with *Thomas v. Morgan*, 2 Cro., M. & R. 496, s. c. 5 Tyr. 1085, and all in the same form, or nearly so. In the Register, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of *Mason v. Keeling*, 12 Mod. 332, s. c. 1 Ld. Raym. 606, much relied upon on the part of the defendant, want of due care was alleged, but the *scienter* was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various *dicta* in the books were cited to show that this is an action founded on negligence, and therefore not maintainable unless some negligence or want of care is alleged.

In Comyns's Digest, tit. Action upon the Case for Negligence (A 5), it is said that "an action upon the case lies for a neglect in not taking care of his cattle, dog," &c.; and passages were

cited from the older authorities, and also from some cases at *nisi prius*, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed without express averment. The precedents, as well as the authorities, fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith v. Pelah*, 2 Stra. 1264, and a passage in 1 Hale's *Pleas of the Crown*, 430,¹ put the liability on the true ground. It may be that, if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a *prima facie* liability in the defendant.

It was said indeed, further, on the part of the defendant, that, the monkey being an animal *feræ naturæ*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during

¹ After stating that "if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner knew not his quality, he is not punishable," &c., Hale adds (citing authorities) that "these things seem to be agreeable to law."

"1. If the owner have notice of the quality of his beast and it doth anybody hurt, he is chargeable with an action for it.

"2. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yes, an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I know it adjudged in Andrew Baker's case, whose child was bit by a monkey that broke his chain and got loose.

"3. And therefore in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damage." 1 Hale's P. C. 430, part 1, c. 33.

the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection; for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred while the defendant kept it. We are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule therefore will be discharged.

Rule discharged.

Injuries by Animals. (a.) Foreign Law. — It will be seen by the historical references in the principal case that this division of the law, like that treated of in the preceding note, is of very ancient origin. In the Roman law the subject dates from the Twelve Tables, which contained this precept: "Si quadrupes pauperiem faxit, dominus noxiæ æstimationem oferto; si nolet, quod nocuit dato;" thus giving the defendant the choice of paying damages for the harm done, or of surrendering the animal which had done it. Inst. Just. lib. 4, tit. 9. Paullus, after stating the same fact, adds "quod etiam, lege Pesulania, de cane cavetur;" from which it appears that a special law was passed to extend the rule to dogs. Paullus, lib. 1, tit. 15, as cited in note to Card v. Case, 5 Com. B. 622, 627, 628, where several other cases are given from the Institutes and Digest. See Dig. lib. 9, tit. 1.

This rule of law, that the animal might be surrendered to the injured person in recompense of the hurt, found its way into the Dutch law of the seventeenth century. See Grotius, b. 3, c. 38, § 10 (p. 453, Herbert's transl.), where it is said, "The owner of the animal who has done this mischief is bound to make good the damage or to give up the animal at his option." This was said of animals in general which

had been infuriated or let loose contrary to custom. In the Roman law the principle was extended to injuries committed by slaves; the master could make pecuniary compensation or tender the slave himself. Inst. Just. lib. 4, tit. 8. Even children could among the ancients be given in recompense of their own delicts. Ib., § 7.

The same rule as to animals seems at one time to have found a place in the law of England. Thus, in Fitzherbert's *Natura Brevium*, 89 L, note, it is stated by (the supposed editor) Lord Hale, "If my dog kills your sheep, and I freshly after the fact tender you the dog, you are without remedy. 7 Edw. 3, Barr. 290." (This, it will be observed, was not the deodand of the English law; a deodand, as the etymology of the word implies, being a forfeiture to *pious uses* of the object which occasioned the injury. But *quære* if the deodand may not have been an ecclesiastical evolution of the above rule?)

The Athenian law directed the animal to be killed or given up to the person injured; Plutarch's Solon, p. 91, E; nor was it necessary under either the Athenian or the Roman law, even for the purposes of an action against the owner, that the owner should be shown to have had notice of the mischievous

propensities of the animal. *Card v. Case*, 5 Com. B. 622, 627, note. Nor does the French Code say any thing of notice. Code Civil, No. 1885.

In the note above cited, a peculiar distinction is referred to as to the *scienter* in the Mosaic code, where it is introduced for the purpose of fixing criminal responsibility in the case of injury to a freeman or freewoman (Exodus, c. 21, v. 29-31), and civil liability in the case of injury to a slave (v. 32), or to cattle (v. 36).

In the German law the owner of a domestic animal which has injured a person is liable only when he knew of the evil propensities of the animal, or was negligently ignorant of them; and, if the animal was under the care of a keeper or herdsman at the time, the owner is liable only upon proof of negligence. Wharton, *Negligence*, § 904.

(b.) *Injuries committed contra or secundum Naturam*. — Dr. Wharton, in his very valuable work on *Negligence* (§ 904), points out the distinction taken in the Roman law between animals which do injury *contra naturam*, and those which do it *secundum naturam*. Inst. Just. lib. 4, tit. 9. If the injury be done by an animal of the former class, we are told that it is assumed that the animal was provoked by the party who received the injury, so that the plaintiff must disprove this presumption in order to recover.

There seems to be no such distinction in the English law; but we are to infer from Buller's N. P. 77, cited by counsel in the principal case, that there is a distinction between wild and tame animals in respect of notice of ferocity. However, it is to be observed that it was conceded throughout the principal case that the allegation of notice was

material, though the animal belonged to the class of wild animals. It would seem advisable in all cases to allege notice; and the allegation would probably be immaterial only in those cases where the injury had been done by a wild animal which had not been fully tamed.

Following the distinction of the Roman law, Dr. Wharton states the rule thus: "The owner of animals kept for use is liable for mischief done by them when unrestrained, *such mischief being in accordance with their nature*; nor in such case is it necessary to prove knowledge on his part that their nature prompts to mischief of this kind." *Negligence*, § 907. That is, if it is natural to the animal, whether he be tame or wild, to do the particular injury complained of, it will not be necessary to prove that the defendant had knowledge of the propensity. "It is the nature of cattle," says the same writer, in illustration of the rule, "when straying at large to ravage the land on which they stray; and hence it is a principle of ethics, as well as of jurisprudence, that he who permits his cattle so to stray is liable for the damage they do." § 908. See *infra*. "When we come, however, to the exhibition of unusual viciousness, such as is not natural to cows as a class, then, in conformity with the principles just stated, the [actual] knowledge of this individual peculiarity of particular cows must be properly imputable to the owner, in order to make him liable for the mischief caused by such viciousness. But such knowledge is to be presumed if the cow in question has been in the habit of displaying such viciousness." § 909.

Under this rule the inquiry in each case therefore is, whether the animal

belongs to a class which has a natural propensity to do the particular mischief, or, if not, whether the particular animal has such a propensity; and, if the answer be in the affirmative, it is not necessary for the plaintiff to go farther and prove actual knowledge of the propensity. This seems to be a reasonable doctrine, if the presumption of knowledge be only *prima facie*; and it would doubtless be permitted the plaintiff to prove such facts under an allegation of notice. See *Worth v. Gilling*, Law R. 2 C. P. 1. But the presumption in the second case, at least, should not be conclusive; for it may be that the defendant had but just purchased the animal, and had in fact no knowledge of its vicious habits.

That knowledge of the evil propensities of wild animals is presumed, see *Wharton, Negligence*, §§ 923, 924, and cases cited.

(c.) *Injuries by Domestic Animals.* — That the rule in *May v. Burdett* is applicable to injuries committed by domestic animals has been decided in several cases. In *Jackson v. Smithson*, 15 Mees. & W. 563, the declaration stated that the defendant wrongfully and injuriously kept a certain ram, well knowing that it was accustomed to attack, butt, and injure mankind, and that the ram, while so kept by the defendant, did attack, butt, and throw down and hurt the plaintiff. On a motion for arrest of judgment, on the ground that it was not alleged that the defendant *negligently* kept the ram, it was held that the declaration was good. Alderson, B., said that there was no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and known by the owner to be so, and one which is *feræ naturæ*. See

also *Oakes v. Spaulding*, 40 Vt. 347, to the same effect.

In *Card v. Case*, 5 Com. B. 622, — a case in the argument of which much learning was displayed, — the doctrine of *May v. Burdett* was held applicable to dogs. In this case, besides the allegation of the *scienter*, it was alleged that the defendant was in duty bound to use due and reasonable care and precaution in keeping the dog; but this was held to be an immaterial allegation. The gist of the action, it was said, was the keeping a ferocious dog, knowing its disposition, and damage to the plaintiff. To the same effect is *Kelly v. Wade*, 10 Irish L. R. 424.

These were cases of injuries to sheep, upon which subject Mr. Campbell (*Negligence*, § 27) says: "The domestic dog has occasioned many legal disputes; and the presumption by the common law of England is that he is tame, and, therefore, the owner is not held responsible unless the dog in question is by disposition ferocious, and reasonable ground be shown for presuming that this ferocious character is known to the owner. This is technically called proof of the '*scienter*' from the term anciently used in pleading. But this presumption was carried to an absurd extent when the wolfish nature of the creature was deemed so completely extinguished that it was against his nature to worry sheep and cattle. And it did astonish the Scotch sheep-farmers when this doctrine was brought to their notice by the decision of a Scotch appeal by Lords Brougham and Cranworth [*Fleming v. Orr*, 2 Macq. 14], who applied the rule to Scotland, so that, as Lord Cockburn observed, 'every dog became entitled to at least one worry.' The consequence was that an act (26 and 27 Vict.

c. 100) was soon afterwards passed (for Scotland), declaring it unnecessary in an action against the owner of the dog to prove a previous propensity to injure sheep or cattle. An act to a similar purport was afterwards passed for England (28 and 29 Vict. c. 60). Similar statutes have been enacted in many of our American States. See Shearman and Redfield, *Negligence*, §§ 205-208; Wharton, *Negligence*, § 923, note.

In the absence of statute, however, the rule requiring an allegation of notice of the vicious propensity of the dog, as well as of other animals, prevails. See Wharton on *Negligence*, § 913, and many cases there cited; and see § 914 of the same work as to dogs which are kept for the defence of property.

The doctrine of *May v. Burdett* was applied to the case of an injury caused by a vicious horse in *Popplewell v. Pierce*, 10 Cush. 509. It was held that the plaintiff need not allege that the injury was received through the negligence of the defendant in keeping the horse. "The gist of the action," said the court, "is the keeping the animal after knowledge of its mischievous propensities."

As to what constitutes notice of the vicious propensity of a domestic animal, see *Appleby v. Percy*, Law R. 9 C. P. 647; *Worth v. Gilling*, Law R. 2 C. P. 1; *Gladman v. Johnson*, 36 Law J. C. P. 153; *Applebee v. Percy*, 30 Law T. N. S. 785; *Arnold v. Norton*, 25 Conn. 92; *Kittredge v. Elliott*, 16 N. H. 77; *Buckley v. Leonard*, 4 Denio, 500; *Cockerham v. Nixon*, 11 Ired. 269.

(d.) *Fences. Escape of Animals.* — By the common law of England (which is held inapplicable to the state of the country in some of our prairie States,

3 Kent's Com. 438, note 1, 12th ed.), the owner of land is bound to keep it fenced; and, if his cattle get into his neighbor's premises, he is liable for the damage done by them, whether the escape was owing to his negligence or not. *Ellis v. Loftus Iron Co.*, Law R. 10 C. P. 10; *Cox v. Burbridge*, 13 Com. B. N. S. 430, 438, Williams, J.; *Fletcher v. Rylands*, Law R. 1 Ex. 265, 281; *Lyons v. Merrick*, 105 Mass. 71; *Richardson v. Milburn*, 11 Md. 340; *Webber v. Closson*, 35 Maine, 26; *Myers v. Dodd*, 9 Ind. 290. In *Ellis v. Loftus Iron Company* the defendant's horse had injured the plaintiff's mare by biting and kicking her through the fence; and it was held that this was a trespass upon the plaintiff's premises.

The law was thus laid down as far back as the time of the Year-Books. See 20 Edw. 4, 11, pl. 10, referred to in *Fletcher v. Rylands*, *supra*, where in trespass with cattle the defendant pleaded that his land adjoined a place where he had common, and that his cattle strayed from the common, and defendant drove them back as soon as he could. The plea was held bad; and Brian, C. J., said: "It behooves him to use his common so that he shall do no hurt to another man; and if the land in which he has common be not inclosed, it behooves him to keep the beasts in the common and out of the land of any other."

It follows that where this rule prevails the owner of cattle which are killed by a passing train of cars while straying upon a railroad track cannot recover for the loss; unless, we should add, the damage was actually caused by the misconduct or negligence of the defendants' servants. *Price v. New Jersey R. Co.*, 3 Vroom, 229; *Munger v. Tonawanda*,

R. Co., 4 Comst. 349; s. c. 5 Denio, 255; and other cases cited in note 1, 8 Kent's Com. 438 (12th ed.).

(e.) *Killing Another's Animals. Detaining Strays.* — It may be proper at this place, by a slight digression from the main purpose of this note, to refer to the rules of law concerning the right of a person to kill vicious animals, or to injure or detain straying beasts and fowls.

It is clear that a man may have property in a dog, though the animal may not be shown to have any pecuniary value. *Dodson v. Moek*, 4 Dev. & B. 146; *Wheatley v. Harris*, 4 Sneed, 468. And the same is doubtless true of other animals kept as pets, and of wild animals which have been tamed, such as wild geese. *Amory v. Flyn*, 10 Johns. 102. And the consequence is, that no one has an *absolute* right to take and keep them while straying: *ib.*; or therefore to kill them: *Dodson v. Moek*, and *Wheatley v. Harris*, *supra*. See also *Dunlap v. Snyder*, 17 Barb. 561; *Leutz v. Stroh*, 6 Serg. & R. 34.

But while there is no absolute right to kill such animals, there are circumstances when the law will justify such an act. Of course, a man may protect himself from an attack of a beast, though if he has provoked the attack, and kills the animal in defending himself, the case would probably be otherwise. This would clearly be the case if the animal were not usually ferocious and "accustomed to bite mankind." The owner would then be entitled to recover damages for the loss of the beast.

A mad dog ought to be killed; so of a dog suspected (with reason) to be mad; and so of one found at large doing or attempting to do mischief, as in biting or worrying sheep, or other

domestic animals. *Brown v. Hoburger*, 52 Barb. 15; *Leonard v. Wilkins*, 9 Johns. 233; *King v. Kline*, 6 Barr, 318; *Woolf v. Chalker*, 31 Conn. 121; *Putnam v. Payne*, 13 Johns. 312. But see *Hinckley v. Emerson*, 4 Cowen, 351, as to dogs chasing and worrying sheep.

A ferocious, biting dog, suffered to run at large without a muzzle, is a common nuisance; and any one may kill it, whether at the time it was doing mischief or not, or whether the owner knew the nature of the dog or not. *Putnam v. Payne*, *supra*; *Maxwell v. Palmerston*, 21 Wend. 407; *Dunlap v. Snyder*, 17 Barb. 561; *Brown v. Carpenter*, 26 Vt. 638.

A man may, however, keep a ferocious dog as a watch-dog, if properly guarded: *Perry v. Phipps*, 10 Ired. 259; but in *Woolf v. Chalker*, *supra*, it is said that this is allowable only under circumstances in which the keeping of concealed weapons, to prevent a felony, would be justified. (Upon this latter point there is a somewhat confused line of cases in England as to spring-guns, of which *Bird v. Holbrook*, 4 Bing. 628, s. c. 1 Moore & P. 607, is the leading one, that we do not propose to consider.)

Nor will the mere fact that domestic animals are found trespassing upon a man's premises justify him in killing them: *Matthews v. Fiestel*, 2 E. D. Smith, 90; *Dodson v. Moek*, *supra*; or in detaining them upon a claim for any thing beyond a reimbursement of necessary expenses and payment of the actual injury done. *Comp. Amory v. Flyn*, 10 Johns. 102. And if the party detain them, he must treat them properly, and not injure them. *Murgoo v. Cogswell*, 1 E. D. Smith, 359. If the owner of the premises drive the animals out with undue violence, whereby they

are injured, he will be liable. *Amick v. O'Hara*, 6 Blackf. 258, where it was held unlawful to chase a horse out of the defendant's field with a ferocious dog.

Upon this subject there are some interesting provisions in the French and Roman law. It was provided by one of the laws of the rural police that a land-owner who had suffered damage by straying animals had the right of seizing them, under the duty of taking them within twenty-four hours to the public pound. 1 Fournel, *Du Voisinage*, 447 (4th ed.). And the author cited says that this power is given not only to the owner of the land in which the damage has been done, but to every neighbor who has witnessed the trespass, because of the interest every neighbor ought to have in the welfare of another.

But, M. Fournel says, the animals must not be treated cruelly; on the contrary, he who seized them should treat them as if they were his own animals. This humane and just requirement was taken from the Aquilian law. "Sic illud expellere debet, quomodo si suum deprehendisset." Dig. lib. 9, tit. 2, 39.

So, too, the land-owner was required to take care, in driving out the animals, to chase them gently and with moderation, and without wounding or hurting them; and if he pursued them too violently, so that the animals, while going in a narrow place, should fall and get injured, the party was liable to the owner of the animals. And this was also founded upon the rule of the Roman law. Dig. lib. 9, tit. 2, 53. Our law, as we have seen, is similar upon both of these points.

If the animals taken trespassing are of the flying kind (*fuyardes*), as geese, fowls, and ducks, the land-owner, after

notifying the owner of the animals, may kill them upon the second offence, because such animals are not easily caught, and their capture would not be worth the trouble or expense of litigation. But, adds Fournel, he ought to leave them upon the ground in order to show that he has not killed them out of covetousness; and likewise, if there were many of them, he ought only to kill a few. (In our law the first qualification would not, of course, be required, for any (proper) evidence would be admissible to show the circumstances under which the fowls had been killed). The fowls, further, can only be killed on the spot, at the moment of the depredation.

The damages in all these cases are very exactly regulated; and M. Fournel gives a table of them. See 1 Fournel, *Du Voisinage*, § 105, pp. 444-459 (4th ed.).

Bringing Dangerous Things upon a Man's Land. — The principle of *May v. Burdett* has in England been extended still farther, and held to cover all cases where one for his own purposes brings upon his land, and collects and keeps there, any thing likely to do mischief if it escapes; such a person is *prima facie* answerable for all the damage which is the natural consequence of an escape. *Rylands v. Fletcher*, Law R. 3 H. L. 330; s. c. Law R. 1 Ex. 265, reversing s. c. 3 Hurl. & C. 774; 34 Law J. Ex. 177.

In this case the defendants had constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir, and under part of the intervening land, had been formerly worked; and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land,

opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, or to any person employed by them in the construction of the reservoir; that such communication existed, or that there were any old workings under the site of the reservoir; and the defendants were not personally guilty of any negligence. The reservoir, in fact, was constructed over five old shafts, leading down to the workings; and, when it was filled, the water burst down these shafts and flowed by the underground communication into the plaintiff's mines. It was held, in the Exchequer Chamber, that the defendants were liable for the damage so caused; and this judgment was affirmed in the House of Lords.

In delivering the judgment of the Exchequer Chamber, Mr. Justice Blackburn said: "The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his bringing it there no mischief could have accrued; and it seems but just that he should at his peril keep it there, so that no mischief

may accrue, or answer for the natural and anticipated consequences. And, upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." The authorities are then reviewed in support of this position from the Year-Books down; embracing cases of injuries by escaping cattle, by mischievous animals, and by filth. Year-Book, 20 Edw. 4, 11, pl. 10; *Tenant v. Goldwin*, 2 Ld. Raym. 1089; s. c. 1 Salk. 360; 6 Mod. 311; *Cox v. Burbridge*, 13 Com. B. n. s. 438; *May v. Burdett*. See also, as to injury from filthy water, *Ball v. Nye*, 99 Mass. 582; *Carstairs v. Taylor*, *infra*.

The principle of *Rylands v. Fletcher* was again enforced by the Court of Exchequer in *Smith v. Fletcher*, Law R. 7 Ex. 305, a case growing out of injury from the same premises. The parties in this case had mines adjoining and communicating with each other. In the surface of the defendants' land were certain hollows and openings, partly caused by and partly made to facilitate the defendants' workings. Across the surface of their land ran a watercourse, which, in 1865, had been diverted into a new and larger channel. In November, 1871, the banks of the new watercourse (which were sufficient for all ordinary occasions) burst, in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks water had passed into the defendants', and so into the plaintiff's mines. It appeared that, if the land had been in its natural condition, the water would have spread itself over the surface, and have done no injury. The defendants, though not

guilty of any negligence in the management of their mine, were held liable for the damage sustained. The case was considered as not distinguishable from *Rylands v. Fletcher*. "The defendants here," said the court, "did not indeed make a reservoir. But suppose they had made the hollow, originally excavated for other purposes, into a reservoir, or fish-pond, or ornamental water, would the fact that it was originally for another purpose than holding water have made any difference? That cannot be. But it is said that they did not bring the water there, as in *Fletcher v. Rylands*. Nor did they in one sense; but in another they did. They so dealt with the soil that, if a flood came, the water, instead of spreading of itself over the surface and getting away to the proper watercourses innocuously, collected and stopped in the hollow, with no outlet but the fissures and cracks."

Both of the above cases were distinguished from *Smith v. Kenrick*, 7 Com. B. 515. There, in the course of the ordinary working of the defendants' mine, water percolating in the strata had flowed from the defendants' mine into that of the plaintiff; and no negligence being proved against the defendants, it was held that they were not liable for the damage caused. The damage sustained by the plaintiff in *Smith v. Kenrick*, said Lord Cranworth (Law R. 3 H. L. 338), was occasioned by the natural flow or percolation of water from the upper mine into the lower; but in the *Fletcher* cases the accumulation of water, said Bramwell, B. (Law R. 7 Ex. 311), was not in the natural use of the land. "If," said the court in *Smith v. Fletcher*, "the similitude to responsibility for a dangerous animal is looked for in this case, it will

be found the defendants did not indeed keep, but they created one for their own purposes, and let it go loose. It is as though they had bred a savage animal and turned it loose on the world." What seems to be the chief distinction, if there was any at all, between this case and *Smith v. Kenrick* was then noticed; namely, the fact that the defendants had diverted the brook, and that the water escaped from the artificial channel which they had made into the hollow and thence into the mine. But the defendant was not satisfied with the judgment, and carried the case up to the Exchequer Chamber; and there the decision of the lower court was reversed, and a new trial granted. The judges, however, gave a very short and guarded opinion (by Coleridge, C. J.); saying that they did not think the case governed in every conceivable aspect by *Rylands v. Fletcher*, and that, had evidence been received (which was offered) to show that every reasonable precaution had been taken to guard against ordinary emergencies, there might have been questions for the consideration of the jury. A distinction was also suggested between water coming from the new diversion and that which came from the natural overflow; and, finally, they thought it desirable that the opinion of the jury should be taken as to whether the acts of the defendants were done in the *ordinary, reasonable, and proper* mode of working the mine. *Smith v. Fletcher*, Law R. 9 Ex. 64.

In 1863, a few years before the above cases were decided, the same questions arose in the Common Pleas in *Baird v. Williamson*, 15 Com. B. n. s. 376. (The *Fletcher* cases are given first for the sake of connection with the previous part of the note; those cases be-

ing express applications of the doctrine of *May v. Burdett*.) The plaintiffs were the owners of a lower mine, and the defendants of an upper; and water had been discharged from the latter into the former. Part of the water had flowed down by mere force of gravitation, as the defendants had prosecuted the work of taking out coal. As to injury from this source, it was held that there was no remedy. "The owners of the higher mine," said the court, "have a right to work the whole mine in the usual and proper manner, for the purpose of getting out any kind of mineral in any part of that mine; and they are not liable for any water which flows by gravitation into an adjoining mine from works so conducted." But part of the water which flowed into the plaintiffs' mine had been raised by the defendants by pumping, alleged to have been for the purpose of getting other mineral lying deeper in the mine. As to the injury from this source, it was held that the defendants were liable. The defendants, it was said, had no right to be active agents in sending water into the lower mine. The plaintiffs, as occupiers of the lower mine, were subject to no servitude of receiving water conducted by man from the higher mine.

Carstairs v. Taylor, Law R. 6 Ex. 217, which involved a somewhat similar question, was a case of some difficulty. The plaintiffs were the defendant's tenants, occupying the lower story of a warehouse, of which the defendant occupied the upper. A hole had been gnawed by rats through a box into which water from the gutters of the building was collected, to be thence discharged by a pipe into the drains; and the water, having poured through the hole, ran down and wet the plaintiffs' goods. It was contended that the

defendant was liable, without proof of negligence, either upon an implied contract, or upon the principle of *Rylands v. Fletcher*, — that the defendant had brought the water to the place from which it entered the warehouse. But both positions were denied by the court. Several distinctions were taken from *Rylands v. Fletcher*. Kelly, C. B., said that the act was caused by *vis major* (which was alluded to by Blackburn, J., in *Rylands v. Fletcher*, in the Exchequer Chamber, as one of two exceptions to liability, the other being the act of God) as much as if a thief had broken the hole in attempting to enter the building, or a flash of lightning or a hurricane had caused the rent. Bramwell, B., distinguished the case on the ground that in *Rylands v. Fletcher* the defendant had *for his own purposes*, as in *Bell v. Twentymen*, 1 Q. B. 766, conducted the water to the place from which it got into the plaintiff's premises; while in the present case the conducting of the water was no more for the benefit of the defendant than of the plaintiffs. And the latter must be taken to have consented to the collection of water. Martin, B., said that *Rylands v. Fletcher* had no bearing on the case, as it referred only to acts of adjoining owners.

The same rule was lately held of tenants of the same landlord occupying respectively an upper and a lower story of a house, where water escaped from a water-closet, occupied exclusively by the upper tenants, but without negligence on their part, and flowed down into the plaintiffs' premises. The defendant was considered as not bound to keep the water from the plaintiffs' premises at all hazards. *Ross v. Fedden*, Law R. 7 Q. B. 661. But in *Marshall v. Cohen*, 44 Ga. 489, where a landlord had rented a building to various ten-

ants, occupying different stories, and all had common access to a water-closet, it was held that he was liable to a tenant of the lower part for damage caused by the carelessness of the other tenants in obstructing the passage of the closet; the ground taken being that the water-closet had been placed in the house by the defendant, and for this reason it was not material who had caused it thus to become a nuisance in its use. The fact was also noticed that the defendant had knowledge of the state of things by actual notice of a previous leak. *Sed quare*. See *post*, note to *Fisher v. Thirkell*. And see *Doupe v. Genin*, 45 N. Y. 119, that a landlord is not bound to protect a tenant on a lower floor from damage caused by an injury to the roof by fire.

Rylands v. Fletcher was also distinguished in *Wilson v. Newberry*, Law R. 7 Q. B. 31, where a person had yew-trees growing on his land, which were clipped by some means not stated, the clippings falling upon the plaintiff's land, whereby his horses were poisoned; the plaintiff knowing that the clippings were poisonous. It was held that no cause of action was disclosed.

The latest case upon this subject is *Madras Ry. Co. v. The Zemindar*, 30 Law T. N. S. 770, in which the Privy Council held that the doctrine of *Rylands v. Fletcher* does not apply to the case of water stored in tanks in India, which have existed from time immemorial, and are preserved and repaired by the land-owners, by reason of their tenure, as essential to the welfare and existence of the people. These tanks were erected for purposes of irrigation, and were recognized and protected by Hindoo law; and the case was compared to that of fires from chartered locomotive engines, to recover for which

it is necessary to prove negligence in the defendants. *Vaughan v. Taff Vale Ry. Co.*, 5 Hurl. & N. 679, *infra*.

The class of cases represented by *Fletcher v. Rylands* must not be confused with those in which a defendant is permitted to divert or retain upon his own premises mere surface water from rain or snow, running in no defined channel, which, but for the diversion or retention, would find its way into the plaintiff's land and benefit him. This, by all the cases, he may do, though the result is damage to the plaintiff. *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 106; *Curtis v. Ayrault*, 47 N. Y. 73, 78; *Livingston v. McDonald*, 21 Iowa, 160, 166; *Broadbent v. Ramsbotham*, 11 Ex. 602; *Rawstron v. Taylor*, ib. 369; 3 Kent's Com. 440, note 1 (12th ed.). And so was the Roman law. "Idem (Labeo and Sabinus) aiunt, aquam pluviam in suo retinere, vel superficientem ex vicini in suum derivare, dum opus in alieno non fit, omnibus jus esse." Dig. lib. 39, tit. 3, l. 1, § 11. The law of France is the same. 1 Fournel, *Du Voisinage*, p. 363 (4th ed.). See note following, on Obstructing and Diverting Water.

But this, according to the English doctrine, seems to be the extent of the rule; and if the defendant has diverted the water (whether surface water or not), or at least obstructed and collected it for his own purposes, he must keep it away from his neighbor at all hazards.

Upon this point, however, the American cases are not all agreed. In Illinois, the English rule seems to prevail. *Gillham v. Madison Co. R. Co.*, 49 Ill. 484. In this case the defendants had made an embankment on the line of the

plaintiff's land, entirely filling up a depression through which water from rain-falls ran, which was thence carried into a lake. The water being thrown back upon the plaintiff's land by the embankment, it was held that the defendants were liable for the damage.

So, in *Livingston v. McDonald*, 21 Iowa, 160, it was held that one who, in the course of reclaiming and improving his land, collects the surface-water of his premises into a drain or ditch, and thereby greatly increases the quantity or changes the manner of the flow upon the lower lands of his neighbor, is liable for the harm sustained. This is a valuable case, in which the doctrine of the Roman law is examined and followed. See *infra*, where some qualification to this rule is stated.

The Supreme Court of Ohio have also recently said that the erection of an embankment upon one's own land, whereby the surface-water accumulating upon the land of another is prevented from flowing off in its natural courses, and caused to flow off in a different direction over his land, is an act for which the latter may maintain an action without showing any actual injury or damage. *Tootle v. Clifton*, 22 Ohio St. 247. See also *Butler v. Peck*, 16 Ohio St. 334. (As to the point that the action is maintainable without proof of damage, see *Williams v. Easing*, *ante*, p. 371, and note; *Fay v. Prentice*, 1 Com. B. 828; 3 Kent's Com. 440, note 1, 12th ed.)

The doctrine of the courts of Pennsylvania, California, and Missouri is the same. *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Griesemer*, *ib.* 407; *Ogburn v. Connor*, 46 Cal. 346; *Laumier v. Francis*, 23 Mo. 181.

And this is the view of Prof. Washburn. *Easements*, 427 (2d ed.).

The rule in Massachusetts is not clearly defined. The doctrine has, at least until very recently, prevailed that in respect of surface-water, or water flowing through drains and ditches (not streams), the owner of the upper land could obstruct it and cause it to flow back upon the lower. *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 106. A coterminous proprietor, it was said in *Dickinson v. Worcester*, may change the surface of his land by raising or filling it to a higher grade by the construction of dikes, the erection of structures, or by other improvements which cause water to accumulate from natural causes on adjacent land, and prevent it from passing over the surface. The same principle was repeated in *Gannon v. Hargadon*; and it was added that the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface could not be interfered with or restrained by any considerations of injury to others which might be occasioned by the flow of mere surface-water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment.

In *Rockwood v. Wilson*, 11 Cush. 221, negligence was held to be the test by which to determine whether one who had opened a covered drain in his land was liable for damage to his neighbor caused by the sudden overflow of the drain after it was closed.

But in the late case of *Shipley v. Fifty Associates*, 106 Mass. 194, a different principle, apparently, was applied to the case of snow and ice which, having collected upon the defendants' building, had fallen into the adjoining

highway and injured the plaintiff, without any negligence on the part of the defendants. The roof, however, had been so constructed as to make such accidents probable. The case of *Rylands v. Fletcher* had now appeared; and the court adopted it as applicable to the question, and held the defendants liable. The decision was based upon the fact that the defendants' building had been so constructed (in 1824) as to make accidents from slides of snow and ice "substantially certain and inevitable;" and the case was likened to the rule that no one had a right so to construct his roof as to discharge upon his neighbor's land water which would not naturally fall there. *Washburn, Easements*, 390; *Reynolds v. Clarke*, 2 *Ld. Raym.* 1399; *Martin v. Simpson*, 6 *Allen*, 102. However careful and diligent the defendants might be to prevent injury, they were liable, with such a roof as the building had (though it was of the usual construction of the time), for any damage occasioned by it.

Still more recently it has been held that one who has collected water upon his premises in a reservoir is liable for the damage caused by percolations of the water through the embankments. *Wilson v. New Bedford*, 108 *Mass.* 261. See also *Monson & B. Manuf. Co. v. Fuller*, 15 *Pick.* 554; *Fuller v. Chicopee Manuf. Co.*, 16 *Gray*, 46; *Ball v. Nye*, 99 *Mass.* 582; *Gray v. Harris*, 107 *Mass.* 492.

In New Hampshire, the doctrine of *Rylands v. Fletcher* is apparently denied. *Swett v. Cutts*, 50 *N. H.* 439. In this case it was held that a person in the reasonable use of his premises is not liable for the injury caused his neighbor by diverting or obstructing water (not gathered into a stream), and thereby causing it to flow over the

plaintiff's land. See also *Bassett v. Salisbury Manuf. Co.*, 43 *N. H.* 569; *s. c.* 3 *Am. Law Reg. n. s.* 238, and Judge Redfield's note; *Brown v. Collins*, 53 *N. H.* 443.

A similar doctrine prevails in Wisconsin. *Hoyt v. Hudson*, 27 *Wis.* 656; *Pettigrew v. Evansville*, 25 *Wis.* 223. See also *Proctor v. Jennings*, 6 *Nev.* 83.

The latest doctrine of the New York courts is opposed to *Rylands v. Fletcher*. Thus, in *Losee v. Buchanan*, 51 *N. Y.* 476, the plaintiff brought an action for damages caused by the explosion of a steam-boiler, standing and worked upon the defendants' premises, whereby the boiler was projected upon the plaintiff's premises, and through several of his buildings; and it was held that without evidence of negligence against the defendants, either in the selection or use of the boiler, they were not liable. Many cases were reviewed, and it was thought that *Rylands v. Fletcher* was supported at best by only one case, *Selden v. Delaware & H. Canal Co.*, 23 *Barb.* 362; and this case, it was said, could not stand in connection with *Bellinger v. New York Cent. R. Co.*, 23 *N. Y.* 47. It was observed, with special reference to the facts in *Rylands v. Fletcher*, that, by the law of this country, if one build a dam upon his own premises, and thus hold back and accumulate the water for his benefit, or if he bring water upon his premises into a reservoir; in case the dam or the banks of the reservoir give way, and the lands of another are flooded, the former is not liable for the damage without proof of some fault or negligence on his part; citing *Angell, Watercourses*, § 336; *Taphan v. Curtis*, 5 *Vt.* 371; *Todd v. Cochell*, 17 *Cal.* 97; *Everett v. Hydraulic Co.*, 23 *Cal.*

225; *Shrewsbury v. Smith*, 12 Cush. 177; *Livingston v. Adams*, 8 Cowen, 175; *Bailey v. New York*, 3 Hill, 531; s. c. 2 Denio, 433; *Pixley v. Clark*, 35 N. Y. 520, 524; *Sheldon v. Sherman*, 42 N. Y. 484. The learned court thought the rule in respect of the communication of fire was also opposed to the English doctrine. "Fire," it was said, "like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one, building a fire upon his own premises, can be made liable if it escapes upon his neighbor's premises and does him damage, without proof of negligence. *Clark v. Foot*, 8 Johns. 422; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Barb. 424; *Lansing v. Stone*, 37 Barb. 15; *Barnard v. Poor*, 21 Pick. 378; *Tourtellot v. Rosebrook*, 11 Met. 460; *Batchelder v. Heagan*, 18 Maine, 32." And other cases of more remote analogy were referred to.

There certainly are cases in New York that are not easily reconciled with the above decision. One of them, *Selden v. Delaware & H. Canal Co.*, 24 Barb. 362, was conceded by the court to be opposed to it. There it was held that if, by means of an enlargement of a canal, for which authority had been given, the lands of an individual were inundated, he was entitled to redress, though the work may have been performed with all reasonable care and skill.

This case was decided upon the authority of *Hay v. Cohoes Co.*, 2 Comst. 159. There the defendants had dug a canal through their land, in accordance with authority which they possessed. It was necessary, in doing this, to blast rocks with gunpowder, and the result of the blasting was, that fragments of

rock were thrown against and injured the plaintiff's dwelling. For the damage sustained he was held entitled to recover, without proof of negligence. The court reasoned thus: The defendants had the right to dig the canal; the plaintiff the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the use of his property altogether; which might be the consequence if the privilege of the former should be wholly unrestricted. If the defendants could injure the plaintiff's house in part, they could demolish it altogether. See also *Tremain v. Cohoes Co.*, 2 Comst. 163.

The court, in *Loosee v. Buchanan*, distinguished this case on the ground that an injury from the blasting of rocks, by the scattering of fragments, was different from that of the explosion of a boiler. But the distinction is not clear.

In *Pixley v. Clark*, 35 N. Y. 520, where the defendants had raised the water of a stream and had built embankments to secure it against overflow, which answered the purpose perfectly, it was held that one who had suffered injury by water percolating through the embankments could recover therefor, without proof of negligence; and the above cases from 2 Comstock were cited as authority for the decision.

So, in *McKeon v. Lee*, 4 Robt. 449, s. c. 51 N. Y. 494, it was held that the defendant had no right to operate a steam-engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining building to such an extent as to endan-

ger and injure them. But "this was decided upon the law of nuisances," said the court in *Losee v. Buchanan*.

We have thus examined all the cases of importance upon this question; and it will be seen that the subject lies in a very confused state. It is not altogether clear, since the decision of the Exchequer Chamber in *Smith v. Fletcher*, Law R. 9 Ex. 64, what the English doctrine is as to cases which are not strictly like *Rylands v. Fletcher*. The opinion of the Exchequer Chamber in the former case certainly suggests the rule of the ordinary, reasonable, and proper means of carrying on the business; but whether this was said as applicable to the diversion of the stream, or to the hollows in the defendants' land, or to both, does not appear. However, it was intimated that there might be a liability for the damage from the diversion; and the meaning of the case perhaps is, that as to such damage as resulted from the reasonable and usual method of merely *working out* the coal, so long as no extraordinary means were employed for facilitating the work, the defendants were not liable; but so soon as it became necessary to bring about great and unusual effort in order to accomplish the desired efficiency, then the defendants took upon themselves the risk of danger from such increased and *unordinary* facilities.

Upon this principle the defendants might well be held liable for the damage caused by diverting the stream

(and of course it is immaterial whether the damage would have been greater or less had not the diversion been made); since that act would be the putting forth a new and great effort by a new and dangerous method, to enable the mine to accomplish an extra result. But as to the damage of water from the hollows, the jury would perhaps be permitted to say that these were created (partly by man and partly by God) in the natural and ordinary course of the mine, with all due care and caution against injury to others.

Perhaps the New York case of *Losee v. Buchanan* would not be inconsistent with this view. If the engine and boiler were already there when the plaintiff built or bought the house,—and as this is not a case of nuisance,¹ that possibly might be admissible evidence,—and no new and unusual appliance had been added to render its efficiency greater, the defendants would not be liable without proof of negligence; otherwise if new machinery and appliances (not merely for repair) had been brought upon the premises and put to use to produce a greater result.

This principle seems a just and reasonable one. A man should be allowed to carry on his business in the ordinary way, and should not, while so doing, be accountable for consequences which he could not control; but if he is not satisfied with the profits of his works, or the condition of his land, and adopts new and dangerous means to better the

¹ A nuisance, it should seem, is something which works harm while in *integro*; that is, while it is in the condition in which the defendant has put or left it. A reservoir or boiler, not being *per se* a nuisance, does not become such by bursting. It is rather the *condition* of a thing that makes it a nuisance than any sudden and unexpected destruction wrought by it. A reservoir is *like* a nuisance, in that negligence (according to *Rylands v. Fletcher*) has nothing to do with the question of liability for damage caused by it; but it is not the same thing. No one could abate a surface-water reservoir, unless it was in a ruinous and unsafe condition. The term "nuisance," however, is loosely used in the books. See the cases in Comyns's Digest, Action on the Case for a Nuisance, A.

one or the other, a miscarriage in which must injure his neighbor, he should be required to make good the loss. If, to take a particular case, my neighbor can render his soil suitable to some special purpose only by making a reservoir or dam upon it, and a break in the embankment will result in damage to my property, he should secure the water at his peril; otherwise he might utterly destroy my property for the benefit of his own. He might as well claim the right to confiscate it at once. See *Hay v. Cohoes Co.*, 2 Comst. 159, 161. If he can improve his property only at the expense of mine, he must be content to let it remain as it is. This is just to me, and not unjust to him. See *Wheatly v. Baugh*, 25 Penn. St. 528, where Lewis, C. J., forcibly says, "The law has never gone so far as to recognize in one man a right to convert another's farm to his own use for the purposes of a filter."

This was the view which the Roman law took of the case, as is shown in *Livingston v. McDonald*, 21 Iowa, 160. In the *Corpus Juris*, lib. 39, tit. 3, 4, it is said, "De eo opere quod agri colendi causa aratro factum sit, Quintus Mucius ait non competere hanc actionem. Trebatius autem non quod agri sed quod frumenti duntaxat querendi causa aratro factum sit solum excepit. Sed et fossas agrorum siccandorum causa factas, Mucius ait fundi colendi causa fieri; non tamen oportere corrivandæ aquæ causa fieri; sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat." See also the preceding and following sections.

The distinction is here plainly made between strictly agricultural operations and those occasioned by works designed to reclaim or improve the land. Where the injury was the result of ordinary farming operations, it was not actiona-

ble; but if the injury resulted in the course of reclaiming and improving the land, as in the making of ditches, the rule was otherwise; "for no one should make his land better in such a way as to make his neighbor's worse."

The same doctrine prevails in the modern civil law. See *Martin v. Jett*, 12 La. 501. The Code of Louisiana provides (Art. 656) that where two estates are situated adjacent to each other, the one below owes to the other a natural servitude to receive the waters which run *naturally* from it, provided the industry of man has not been used to create that servitude. *Martin v. Jett*. In this case the learned court say, "Let us see to what extent the corresponding article in the Code Napoleon has been thought by able jurists in France to authorize any artificial works by which the servitude might be rendered more onerous, with a view of favoring the great interests of agriculture. Duranton, to whose work our attention has been directed, in commenting upon the 640th article of the Napoleon Code, which forbids the owner of the superior estate to do any thing which might aggravate the condition of the inferior one, says, 'Thus, he cannot make on his land any works which would change the natural passage (*immission*) of the waters upon the inferior estate, either by collecting it upon a single point, and giving it thereby a more rapid current, more apt to carry down sand, earth, or gravel upon the land, or by directing upon a point on the same land a much greater volume of water than it would have received without such works.' And he cites Book 39 of the Digest, tit. 3, 1; 1 Duranton, No. 164. [See also 1 Fournel, *Du Voisinage*, p. 398, 4th ed.] But the same author proceeds to say that the owner of the superior

estate may make any work upon it necessary, or simply useful to the cultivation of his land, such as furrows in a planted field. He may also, in planting vines or forming a meadow, make ditches for the irrigation of the meadow, or for the purpose of making the vines more healthy and vigorous. *Ib.* No. 185." And this seems to mean merely that the French farmer may do that which is usual in raising his crops.

It is not, however, to be inferred from the rule that the hand of man shall not be used in directing the course of the water, says M. Pardessus, as quoted in 1 Fournel, *Du Voisinage*, p. 399 (4th ed.), that the proprietor from whose land the water passes to his neighbor below can do nothing upon his land, and that he may be condemned to abandon it to perpetual sterility, or never vary the working of it, because this might change the course of the water. The cultivation of the soil is in the interest of society, and no one can say that the natural course of water is thereby changed. The upper owner may not only direct his furrows, but also his necessary trenches for the drainage of his land, towards one more than towards another lower estate, in the absence of any right acquired against him. And this opinion was founded upon the Digest, lib. 39, tit. 3, 1, §§ 3, 4, 5, 7. See also *Bellows v. Sackett*, 15 Barb. 99, 102; *Waffle v. New York Cent. R. Co.*, 58 Barb. 413; *Dela-houssaye v. Judice*, 13 La. An. 587; *Earl v. De Hart*, 1 Beas. 280; *Kauffman v. Griesemer*, 26 Penn. St. 407; *Miller v. Laubach*, 47 Penn. St. 154; *Sharpe v. Hancock*, 8 Scott, N. R. 46; *Cooper v. Barber*, 3 Taunt. 99; *Wood v. Waud*, 3 Ex. 748; *Williams v. Gale*, 3 Har. & J. 231; *Goodale v. Tuttle*, 29 N. Y. 459; *Angell, Watercourses*,

§§ 108 *a et seq.*, where the subject of drainage is further considered.

This distinction between the ordinary cultivation of the soil and extraordinary improvements derives support from analogous cases. Thus, one may use the water of a stream for domestic purposes, and for his cattle, but not to irrigate his land if that will exhaust or materially diminish the stream. *Brown v. Best*, 1 Wils. 174; *Smith v. Adams*, 6 Paige, 435; 3 Kent's Com. 440, note. See also *Elliot v. Fitchburg R. Co.*, *post*; *Sutton v. Clarke*, 6 Taunt. 29, 44, where Gibbs, C. J., speaks of the case of one who, for his own benefit, makes an improvement on his land and thereby unwittingly injures his neighbor, for which he is answerable, though the improvement was made according to his best skill and judgment, and without foreseeing that it would injure his neighbor. But see *Rockwood v. Wilson*, 11 Cush. 221, 227.

As to the rule concerning the making of fires upon one's premises, which the court in *Losee v. Buchanan* regarded as inconsistent with the doctrine of *Rylands v. Fletcher*, it would seem that they are not wholly inconsistent with the above view of the law.

The leading case on this point, *Clark v. Foot*, 8 Johns. 421, is very shortly reported. The defendant had set fire to his fallow ground, and the fire, communicating with the plaintiff's woods, caused the damage complained of. It was held that the defendant was not liable unless he had been guilty of negligence; and the mere building the fire in the fallow ground was held lawful. The case was likened to the burning of one's house from a fire in his neighbor's, which had caught without his fault; for which no action could be

maintained. 3 Black. Com. 48; 1 Noy's Max. ch. 44.

The principle, in view of this analogous case, seems to be this: It is usual and proper for one, in the ordinary cultivation of his farm, to burn his fallow ground (in some parts of the country it is regularly done every season, as much so as the ploughing), as it is usual to build a fire in one's house, and therefore it must, as well, be permitted. See *Turbeville v. Stampe*, 1 Ld. Raym. 264; s. c. 1 Salk. 13.

Now, it is apprehended that the English courts of the present day would readily admit the rule as to fires built within a man's house, for ordinary purposes, and would have no disposition to say that this is bringing a dangerous element on a man's premises which he must guard at his peril; and the only difference between such a case and that of burning fallow ground is that the danger of damage is somewhat greater in the latter case. The rule of negligence would perhaps be different; greater precaution doubtless being required in the case of a fire in an open field than in the case of one in a stove. But without any want of care, it may well be that a fire in fallow ground, when usual, is lawful. If, however, the defendant had set fire to his woods to save the expense and trouble of cutting down the trees (which might happen where the trees were not valuable), we conceive that a different rule of law would have been declared, and the plaintiff held entitled to recover without any allegation of negligence. *Quære*, whether *Calkins v. Barger*, 44 Barb. 424, and *Stuart v. Hawley*, 22 Barb. 619, can be sustained?

As to fires communicating from the sparks of locomotive engines, this distinction is taken: that if the railway

company had not express statutory power to use such engines, they are liable for damage by fire proceeding from them, though negligence be negatived. *Jones v. Festiniog Ry. Co.*, Law R. 3 Q. B. 788. But where the legislature has authorized the use of the engines, and they are used for the purpose for which they were authorized, and every precaution has been taken to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use, independently of negligence, the company are not liable. *Vaughan v. Taff Vale Ry. Co.*, 5 Hurl. & N. 679, in Ex. Ch.; *Mazetti v. New York & H. R. Co.*, 8 E. D. Smith, 98.

Upon the same principle it is held that a water-works company, having laid down pipes under a statutory power, are not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity. *Blyth v. Birmingham Water-works Co.*, 25 Law J. 212. See *Madras Ry. Co. v. The Zemindar*, 30 Law T. N. s. 770, *supra*.

The above view of the liabilities of parties who bring upon their lands dangerous things makes the defendant in effect an insurer; and why should he not be? The plaintiff pays the premium of parting with something of the security to life and property which he previously enjoyed, in order that the defendant may carry on a prosperous business. It matters not that the premium is paid under compulsion; the defendant should be required to take the risk as much as if the payment were made upon consent, and as the express consideration of the assumption of the risk. The plaintiff's detriment is the price of the defendant's business. It

is more than this: it is essential to it; and the defendant should therefore either restore the premium, by removing the dangerous thing, or be required to make good the destruction done by it. Or, to put the case in another way, he should be ready to restore the plaintiff at all times to the position in which he was before he (the defendant) altered it. If he is not willing to do so before the calamity, when the plaintiff cannot compel him, but elects to go on, he should be compelled to make good the situation afterwards. It is an elementary principle that if a person fails to restore property to another which he has taken, while he may, he must pay for its value if, by electing to keep it, he destroys it. He becomes, in effect, an insurer.

The servitude of aqueduct, as it is called in the foreign law, which consists in the right of directing the course of flowing water from an upper estate upon a lower, has received more consideration in the law of France than it has in modern times in the law of England; though there is much in Bracton upon the subject. See note on Nuisance; Bracton, 231 b, where there is a short chapter on aqueducts.

It is fair to presume that the good sense of the French and Roman law will, so far as it is applicable to the situation of the country, generally commend itself to our courts.

In the Digest it is said that there are three things which subject the lower land to the purposes of the upper, — the law, the nature of the place, and length of time. Lib. 39, tit. 3, 2.

Commenting upon this passage, a well-known French writer says that when nature indicates the passage and flow of these waters by the slope of the land and by the respective situation of

the places, the upper proprietor has no need of any other title than that of the locality itself; and upon this circumstance alone he can compel the lower proprietor to receive the waters by right of a natural servitude. 1 Fournel, *Du Voisinage*, p. 388 (4th ed.). And so the Digest also directly declared. But this is a *natural servitude*, and the water must flow by nature, without the hand of man. Ib.

The foreign law further requires that the flow should be perpetual (*perennis*) in order to raise a *natural servitude*; a momentary and accidental flow does not confer the *same* right. Ib. p. 389. But this, as explained by M. Fournel, seems to refer to changes made by the hand of man. If, says he, a man make an artificial watercourse, the flow of which is directed upon his neighbor, the latter may refuse to receive it, since the claim is not derived from a *continuous* watercourse, imposed by nature. Ib. p. 390.

The same writer proceeds to say that if the lower land has no natural slope, by which the water can pass to his neighbor further down, he must keep the same until an agreement is made with his neighbor below; and so on until the water flows into other waters which by a natural course have acquired a right of passage upon the lower estates.

It is worthy of notice, that by the law of France, if the water flows from a spring newly opened, or from a collection of water lately made, then the direction of the flow should be determined by agreement with the lower proprietor, who has the power of choosing the place by which the flow will least discommode him. 1 Fournel, *Du Voisinage*, p. 389 (4th ed.). It follows, in such case, that the upper owner lets

the water flow down at his peril before consulting his neighbor below. lb. p. 390.

But when the bed of the flow is once fixed, whether by agreement or possession (which latter would, it seems, equally indicate consent), the upper proprietor cannot change the direction of the stream. lb. p. 389.

In the following note we consider the converse case, of the right of obstructing and diverting running water, and thus preventing its passage to the lower proprietors.

OBSTRUCTING AND DIVERTING WATER.

SPRINGFIELD v. HARRIS, leading case.

ELLIOT v. FITCHBURG R. Co., leading case.

Note on Obstructing and Diverting Water.

Surface-water.

Foreign law.

Usufruct and reasonable use.

Grant and prescription.

Sub-surface water.

CITY OF SPRINGFIELD v. SAMUEL HARRIS.

(4 Allen, 494. Supreme Court, Massachusetts, September, 1861.)

Mill Privileges. The owner of land over which a natural stream of water flows has a right to the reasonable use of the water for mills or other purposes, whatever may be the effect upon the owners of lands below; and he is not liable to an action for obstructing and using the water for his mill, if it appears that his dam is only of such magnitude as is adapted to the size and capacity of the stream and to the quantity of water usually flowing therein, and that his mode of using the water is not unusual or unreasonable, according to the general custom of the country in cases of dams upon similar streams.

TORT for the obstruction of a natural stream of water by means of a dam.

At the trial in the Superior Court, before Vose, J., there was evidence to show the uses which the plaintiffs have heretofore made of the water of the stream, where it crosses Main Street in the city of Springfield, below the defendant's land, and the method in which the defendant has used and obstructed the same; and it was a question in dispute whether the plaintiffs had established a title to Main Street. Upon the evidence in respect to the latter question, the facts not being denied, the judge ruled that the plaintiffs had not made out their title, and he directed the jury to return a verdict for the defendant, and also to answer the two following questions: "1. Is the dam of the defendant of such magnitude as is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein? 2. Is the mode of using the dam by the defendant,

by closing the gate at night for the purpose of letting the pond fill, an unusual and unreasonable use, according to the general custom of the country in cases of dams upon similar streams?" The judge instructed the jury that, in answering these questions, they were to decide as practical men, upon the evidence in the case, with their judgments aided by the testimony of the experts, and the evidence relative to the general usage or custom of the country, or to dams upon similar streams, and by their own view of the premises, and that they were not to take into view the rights claimed by the plaintiffs in determining the facts involved in these inquiries.

The plaintiffs made no objections to these instructions, and did not ask for any others; and the jury answered the first question in the affirmative, and the second in the negative.

To the ruling of the judge directing the jury to return a verdict for the defendant, the plaintiffs alleged exceptions.

N. A. Leonard, for the plaintiffs. *J. Wells*, for the defendant.

MERRICK, J. It appears from the pleadings, and from the facts stated in the bill of exceptions, that Garden Brook is a natural stream running by and over the land of the defendant, and thence through Main Street in the city of Springfield. The plaintiffs claim to be owners in fee of all the land included within the limits of said street, and that they are entitled to have the water flow in said stream at all times without obstruction, in order that they may use it, as they have a right to do, for sewerage, for extinguishing fires, and for all other purposes essential to the health and safety of the city. The defendant is the owner and occupant of a mill standing upon his said land; and he admits that during the whole period in which the obstruction complained of is alleged to have occurred, he has, in operating his mill and the works contained in it, used the water of said stream by means of a dam, which for that purpose he has erected and maintained across it. The plaintiffs in their declaration allege that this dam was and is "of a larger magnitude than is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein." And this is the particular grievance of which they complain, and which they set forth as their cause of action against the defendant.

The action can be maintained only by the proof of this material allegation ; for the defendant had a right to use the water in a reasonable and lawful manner to work and operate his mill, whatever might be the effect of such use in reference to any easement to which proprietors of land situate at any point below it might otherwise be entitled. Each proprietor of land through which a natural watercourse flows has a right as owner of such land, and as inseparably connected with and incident to it, to the natural flow of the stream for any hydraulic purpose to which he may think fit to apply it ; and it is a necessary consequence from this principle that such proprietor cannot be held responsible for any injurious consequences which result to others, if the water is used in a reasonable manner, and the quantity used is limited by, and does not exceed, what is reasonably and necessarily required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream and the quantity of water usually flowing therein. *Thurber v. Martin*, 2 Gray, 394 ; *Gould v. Boston Duck Co.*, 13 Gray, 442 ; *Tourtellot v. Phelps*, 4 Gray, 376.

The jury having found, under instructions in matter of law which are admitted to have been correct and unobjectionable, that the plaintiffs have failed to establish the material allegations in their declaration relative to the dam erected and maintained by the defendant across the stream, and having also found that the said dam is only of such magnitude as is adapted to the size and capacity of the stream and to the quantity of water usually flowing therein, and that the manner in which he used the water was not an unusual or unreasonable use of it, according to the general custom of the country in cases of dams upon similar streams, it is obvious that the plaintiffs were not entitled to recover any damages, and therefore that the verdict was properly rendered for the defendant.

It is objected that the court erred in ruling that the plaintiffs had not upon the evidence shown that they had acquired any prescriptive right to the water in the brook, and in directing the jury for that reason to return a verdict for the defendants. It would have been more regular to reserve these directions, which were predicated wholly upon questions of law, and to submit to the jury the questions of fact in issue, which were specially submitted to them with instructions that if they found the first in

the affirmative and the second in the negative, they should in that case render a verdict for the defendant. But as we do not perceive that the plaintiffs were at all prejudiced or subjected to any disadvantage by the course pursued, such irregularity affords no sufficient cause for disturbing the verdict, which was rendered exclusively upon particular questions of fact which were wholly independent of and distinct from the questions of law. And as the finding of the jury upon those particular questions makes it certain that the plaintiffs could in no event maintain their action, it becomes unnecessary to consider whether the ruling of the court in relation to the plaintiffs' alleged title was correct; for whether they owned the soil, or had acquired any prescriptive right to the use of the water, or were mere riparian proprietors, it is obvious that judgment must necessarily, upon the finding of the jury upon those questions of fact, be rendered for the defendant.

Exceptions overruled.

LEWIS ELLIOT v. THE FITCHBURG RAILROAD COMPANY.

(10 Cush. 191. Supreme Court, Massachusetts, October Term, 1852.)

Damage. One riparian proprietor cannot maintain an action against an upper proprietor for a diversion of part of the water of a natural watercourse flowing through their lands, unless such diversion causes the plaintiff actual perceptible damage.

THIS action was tried in this court, at the October term, 1849, before Metcalf, J., under whose rulings a verdict was found for the defendants. The plaintiff excepted to the rulings and instructions, which, with the facts of the case, sufficiently appear in the opinion.

D. S. & W. A. Richardson, for the plaintiff. *G. F. Farley*, for the defendants.

SHAW, C. J. This is an action of the case against the defendants, for diverting the water of a small brook, passing through land of the plaintiff in Shirley. The facts are briefly these: The plaintiff is the owner of certain land, and for more than sixty years a small brook, having its sources in several ponds, has, in its natural course, flowed through lands of various persons, viz.,

of one Clark, of one Furnin, and then through the plaintiff's land, which is about half a mile below said Clark's, and from the plaintiff's land, through various other lands, to Nashua River. Said Brook was in part supplied by a never-failing spring, on said Clark's land, near said brook, and having its outlet into it. The defendants, pursuant to a warranty deed from said Clark, of a perpetual right and privilege to make and maintain a dam and reservoir, and draw and use the water therefrom, erected such dam across said stream, below said spring, and made said reservoir upon and about the same, and inserted a lead pipe therein, by means of which they have used and constantly taken water, from said reservoir, to their depot in Shirley, and used the same for furnishing their locomotive steam-engines with water, and for other similar purposes. The defendants offered evidence tending to prove that said Clark, where said brook runs through his meadow, which is wet and springy, had cut ditches across the meadow to the brook, thereby increasing the flow of water to the brook; and it was further proved that there is no outlet for the water of said meadow, except into this brook. The meadow is situate below the dam.

The plaintiff contended that if the jury were satisfied of the existence of the brook, as alleged, and the diversion of the water therefrom by the defendants, he was entitled to a verdict for nominal damage, without proof of actual damage. But the presiding judge instructed the jury that unless the plaintiff suffered actual perceptible damage in consequence of the diversion, the defendants were not liable in this action. In connection with this instruction, the judge further instructed the jury that if they believed that the defendants, by excavating said reservoir and spring above the dam, or that said Clark, by digging said ditches, had increased the flow of water in said brook, equal to the quantity of water the defendants had diverted therefrom, then the defendants were not liable in this action.

The whole court are of opinion that this direction was right in both particulars.

This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it, and regulate the rights of riparian proprietors, through and along whose lands it passes, as are held to apply to other water-courses, subject to this consideration, that what would be a reason-

able and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream, just sufficient to furnish water for domestic uses for farm-yards, and watering-places for cattle.

The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in water-courses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below, on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right.

The right to flowing water is now well settled to be a right incident to property in the land ; it is a right *publici juris*, of such character that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land ; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor ; whereas, taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply or watering cattle ; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is therefore, to a considerable extent, a question of degree ; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes.

It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. But this, we think, is an abstract question which

cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump — for the mode is not material — to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which, in its ordinary operation, will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such, that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, whilst the other would nearly deprive him of the whole beneficial use, and yet, in both, the water would be used for irrigation. We cite a few of the leading cases in Massachusetts on this subject. *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Mass. 420; *Cook v. Hull*, 3 Pick. 269; *Anthony v. Lapham*, 5 Pick. 175.

This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors. Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration, or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper propri-

etor for taking any portion of the water of the stream for any purpose; such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor in entering the close of the upper to abate it. *Colburn v. Richards*, 13 Mass. 420.

It would also follow, as the legal and practical result, that no proprietor could have any beneficial use of the stream, without an encroachment on another's right, subjecting him to actions *toties quoties*, as well as to a forcible abatement of the nuisance. If the plaintiff could, in a case like the present, have such an action, then every proprietor on the brook, to its outlet in Nashua River, would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimack River to the ocean. This is a sort of *reductio ad absurdum*, which shows that such cannot be the rule, as was claimed by the plaintiff.

Without intending at present to state the authorities fully, we refer to the following English cases, as tending to illustrate and fix the rule as stated: *Bealey v. Shaw*, 6 East, 208; *Duncombe v. Randall*, Hetley, 32; *Williams v. Morland*, 2 B. & C. 910; 4 Dow. & Ry. 583; *Wright v. Howard*, 1 Sim. & Stu. 190.

If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below, by diminishing the value of his land, though at the time he has no mill or other work to sustain present damage, still, if the party thus using it has not acquired a right by grant, or by actual appropriation and enjoyment twenty years, it is an encroachment on the right of the lower proprietor, for which an action will lie. *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; *Wood v. Waud*, 3 Welsby, Hurlst. & Gord. 748. But the doctrine is much discussed and settled on deliberation, in a recent case decided in the Court of Exchequer. *Embrey v. Owen*, 6 Welsby, Hurlst. & Gord. 353.

The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in

all the proprietors to the reasonable enjoyment of the same gift of Providence. It is therefore only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie; but for such deprivation or unwarrantable use an action will lie, though there be no actual present damage. So it is subsequently stated in the close of the case last cited: "so long as this reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie."

We think the most reliable American authorities are to the same effect. 3 Kent Com. (6th ed.) 439; Angell on Watercourses, ch. iv.; *Blanchard v. Baker*, 8 Greenl. 253; *Tyler v. Wilkinson*, 4 Mason, 397; *Webb v. Portland Manufacturing Co.*, 3 Sumner, 189; *Anthony v. Lapham*, 5 Pick. 175.

The same doctrine has been held in a recent case in New York. *Van Hoesen v. Coventry*, 10 Barb. 518.

In applying these rules to the present case, we are to consider that Clark, who owned the land on which the dam was built, and the defendants to whom he conveyed all his right to the use of the water, as holding together the whole right; and it is to be considered in the same manner as if the defendants owned the land. We think it was properly left to the jury to find whether the defendants, claiming in the right of Clark, had, by their diversion of the water for a valuable and highly beneficial use, caused any actual or perceptible damage, and, if not, to find for the defendants. It is very clear that here is no complaint of the total diversion of the stream from the plaintiff's land; no such ground of complaint is set forth or relied on. The bed of the stream and the stream itself remains and passes through the plaintiff's land as it did before. The gravamen of the complaint is not for diverting the stream itself, but for abstracting a part of the water of the stream. This is a right which each proprietor has, if exercised within a reasonable limit. The proper question therefore was, whether, in the mode of taking, in the quantity taken, and the purpose for which it was taken, there was a reasonable and justifiable use of the water by Clark. The use being lawful and beneficial, it must be deemed reasonable, and not an infringement of the right of the plaintiff, if it did no actual and perceptible damage to the plaintiff; and therefore we think that question of fact

was rightly left to the jury, who must have found that it did him no such damage.

We consider the other direction correct also, as we understand it. The question was not, if the defendants had caused a damage to the plaintiff, amounting in law to a disturbance of his right, for which an action would lie, whether it would be barred by an advantage of equal value, conferred in nature of a set-off; but whether, the improvements of Clark upon his meadow taken together as a whole, including the dam and ditches as parts of one and the same improvement, any damage was done to the plaintiff; and this, we think, was correctly so left.

It may perhaps be proper to guard against misconstruction, in considering what are the general rights and duties of persons owning lands bounding on running streams, by the general rules of law and for general purposes, that some alterations of these rules may be effected in Massachusetts, by the acts of legislation on that subject, in respect to mills, and the construction which has been judicially put upon such legislative acts. This system originated with the provincial act, 13 Anne, passed in 1714, Ancient Laws and Charters, 404. This act by its operation necessarily secures, to some extent, advantages to the prior occupant of a stream, by a dam erected to work a mill. *Bigelow v. Newell*, 10 Pick. 348; *Bemis v. Upham*, 13 Pick. 167; *Baird v. Wells*, 22 Pick. 312.

It is not necessary, however, now to go into this subject, but merely to say that the rights to streams of running water, upon which the present question turns, are not dependent upon or affected by the mill acts.

Exceptions overruled.

Surface Water. (a.) Foreign Law. — In the preceding note we have discussed the question of the liability of one who fails to keep within his own premises a dangerous element which he has brought there; and particularly the liability of a man who has allowed water, which he has collected for use, to escape upon his neighbor's premises. In the present note we propose to consider, *e converso*, the question of a man's right to withdraw water from the reach of his neighbor, or otherwise to prevent its passage to him, in whole or in part, or in its usual course. The Roman law contained a provision that it was not actionable for a man, by digging in his own land, to cut off a spring of water from his neighbor, provided it was done in the course of improving his land, and not with intent to commit injury. An owner of lower land could maintain an action against the owner of the upper tenement, if

the defendant should send down water otherwise than as it was wont to flow by nature. In fine, it was said, one could have the action *aquæ pluvie arcendæ*, if the injury from the surface water was caused by work done, unless the work was done in the course of the cultivation of the land. There appears, also, to have been a distinction between injuries to land by surface water, and injuries to buildings or walls by water dripping (*stillicidium*), and by water running in gutters and drains (*flumen*); the action being general in the latter case, and special in the former. Dig. lib. 39, tit. 3, 1, §§ 12-17.

The English law, it will be found, contains similar principles, with, however, some modifications as it descends into the details.

The rule as to surface water running in no defined channel, as we have seen in the preceding note, is that the owner of the soil may collect and use it, wholly preventing its passage to his neighbor. See *ante*, p. 496; *Rawstron v. Taylor*, 11 Ex. 369. This was the Roman law also. Dig. lib. 39, tit. 3, 1, § 11.

The law of France, which is similar, is very clearly stated by M. Fournel, in his *Traité du Voisinage*, vol. 1, § 95, pl. 1 (p. 363, 4th ed.). Rain and spring water, he says, considered merely as an *element*, cannot be the subject of exclusive ownership. It is common property, like the air, and belongs to him who first takes possession of it. But this common character ends the moment when the waters are brought together upon a particular estate. Then, mixing and identifying themselves with the soil, they become property, like things "accessary." The owner, M. Fournel proceeds to say, can then, at his own pleasure, use this water; he can put and keep it in basins, cisterns, or

reservoirs, and he can make it disappear by subterraneous channels, without being bound to account to his neighbors for the use which he has made of it, unless the lower land-owner has acquired against him the right to restrain him in the exercise of *this extreme liberty*, as it was called. And this is the principle of the French Civil Code, art. 641, which declares that he who has a spring in his land can use it at will, save the right that the owner of the lower land may have acquired by grant (*titre*) or prescription.

There is also a limitation in respect of water of this character which is useful to the public. "Le propriétaire de la *source* ne peut en changer le cours, lorsqu'il fournit aux habitants d'une commune, village, ou hameau l'eau qui leur est nécessaire; mais si les habitants n'en ont pas acquis ou prescrit l'usage, le propriétaire peut en réclamer une indemnité, laquelle est réglée par expert." Code Civil, art. 643; 1 Fournel; *Du Voisinage*, p. 375 (4th ed.).

As to what is mere surface water not running in a defined channel, see *Rawstron v. Taylor*, 11 Ex. 369; *Broadbent v. Ramsbotham*, ib. 602.

(b.) *Usufruct and Reasonable Use.*

— In regard to surface streams running in defined channels, the principal case, *Elliot v. Fitchburg R. Co.*, enunciates a doctrine which has become well settled in the law. The principle is, that riparian proprietors have no absolute right to the water of the streams flowing by them, but merely the usufruct. They are entitled to make a proper use of the water; and in no case is a party liable to a lower land-owner for abstracting water, if actual damage has not been done him. *Wadsworth v. Tillotson*, 15 Conn. 366; *Gillett v. Johnson*, 30 Conn. 180; *Seeley v. Brush*, 35 Conn. 419;

Chatfield v. Wilson, 31 Vt. 358; *Gerish v. New Market Manuf. Co.*, 30 N. H. 478, 483; *Pollitt v. Long*, 58 Barb. 20; *Dilling v. Murray*, 6 Ind. 324; *Williams v. Morland*, 2 Barn. & C. 910; *Mason v. Hill*, 3 Barn. & Ad. 304; s. c. 5 Barn. & Ad. 1; *Embrey v. Owen*, 6 Ex. 353; *Wood v. Waud*, 3 Ex. 748, 781; 3 Kent's Com. 440 note 1 (12th ed.).

There have been expressions by the courts, and one or two decisions, to the effect that the right to the use of the water of a running stream is something more than a usufruct, and is in fact absolute, like that to the enjoyment of land; so that any diminution of the water by an upper proprietor is actionable, if he have not a right by grant or prescription, just as an entry upon land without license is actionable. In *Crooker v. Bragg*, 10 Wend. 260, it was decided that the diversion of a stream was actionable, though the plaintiff, a mill-owner upon the opposite bank, did not need the whole or any part of the stream for the use of his mill. But the situation was such that the plaintiff, in order to obtain a supply of water after the diversion, would be compelled to construct a dam or raceway; so that, in fact, there was a prejudice to him by the act of the defendant, and so the court held. The language of the case must therefore be taken with reference to this fact. However, in saying that the right to the water of a stream running through a man's land was as perfect and indefeasible as the right to the soil, the court were clearly wrong.

But a case in Pennsylvania seems to have gone to the full extent of this doctrine. *Wheatley v. Chrisman*, 24 Penn. St. 298. In this case it appeared that a small stream ran through the lands

of both the parties, and that the plaintiff, the lower proprietor, had enjoyed the use of the water for upwards of twenty years. The defendant requested the judge to charge the jury that he was entitled to a reasonable use of the water for the purpose of his business, and that if they believed that no more than a reasonable quantity for such purpose was used, as for the creation of steam to drive his engine, the plaintiff had no ground for complaint. The court declined the request, and charged that the defendant had the right to use the stream for any legal purpose, provided he returned it to its channel uncorrupted and without any essential diminution; and this instruction was upheld by the Supreme Court. "The wrong," said the court, "must cease, no matter how trifling it may seem. The right of the plaintiff is absolute to be restored to the full enjoyment of his own property, and is not dependent in any manner upon its value, either to himself or his adversary."

The true principle, however, is that the lower riparian proprietor has, as against the upper proprietor, merely a usufruct, and not an absolute right to the water, however long he may have been in the enjoyment; and, this being so, there can be no infraction of the right by any abstraction of water which does not sensibly and injuriously diminish its volume. Without such an act, the usufruct is not interfered with, and the plaintiff's right, therefore, has not been encroached upon.

In some particulars, however, the right of action of a lower proprietor does not depend upon the question of damage. See 3 Kent's Com. 440, note 1 (12th ed.), where several cases of this kind are mentioned. Thus, in *Sampson v. Hoddinott*, 1 Com. B. N. 8.

590, the plaintiff had immemorially enjoyed the right of receiving the water from the defendant's mill at certain times of the day for the purposes of irrigating his land. Recently, however, the defendant, for the purpose of irrigating his own land, had diverted the water after it had passed the mill, and before it reached the plaintiff; and though it did not appear that the quantity which ultimately reached the plaintiff was diminished, it reached him so late in the day that the plaintiff could not use it fully. It was held that the action was maintainable without proof of actual damage. It follows, *a fortiori*, that an action can be maintained for a permanent diversion. *Tillotson v. Smith*, 32 N. H. 90; *Chatfield v. Wilson*, 27 Vt. 670; s. c. 31 Vt. 358; *Corning v. Troy Iron & Nail Fact.*, 40 N. Y. 191, 204; *Van Hoesen v. Coventry*, 10 Barb. 518; *Parker v. Griswold*, 17 Conn. 288. In *Mill River Manuf. Co. v. Smith*, 34 Conn. 462, it was held actionable for a riparian proprietor to cut ice from a pond. And, in general, it is probably true that where a right is exactly defined, any infraction will be ground for an action, entitling the plaintiff to nominal damages at least. Thus, in the case of a right to the possession of land, no one can lawfully put foot upon the soil of another without permission, express or implied; and for every infraction of this right an action may be maintained, though the owner of the land suffered no damage whatever. *Williams v. Esling*, *ante*, p. 371. But the right of usufruct in running streams is incapable of any such exact definition, and the courts can only say that where the plaintiff has sustained actual injury from an undue use of the water, he has a ground of action; short of this, he has not. Compare the doc-

trine concerning the right to the lateral support of ground, which is similar. *Smith v. Thackerah*, Law R. 1 C. P. 564.

Whether the test of liability in cases not arising under the statutes concerning mill privileges be the reasonable use of the water, or that of damage to the lower proprietor, is not clear. Both tests are mentioned in *Elliot v. Fitchburg R. Co.*, as though they were equivalent; but it was not necessary to consider the point, nor was it considered, since no damage was proved; and it is clear, as we have stated, that there must be damage in order to the maintenance of the action. Suppose, however, there is damage to the plaintiff, and yet the use of the water by the defendant has been no more than was usual and reasonably necessary in carrying on his business; is there then a right of action?

In *Gillett v. Johnson*, 30 Conn. 180, the test of the reasonable use was applied, but applied as equivalent to that of damage or no damage. The question raised was of the extent of the right of the defendant to the use of a small stream for purposes of irrigation. It was held that the defendant could use the stream for that purpose; but the right, it was said, could only be exercised upon a reasonable regard to the plaintiff's right to the use of the water. It was not enough that the water had been applied to a useful and proper purpose, and in a prudent and husband-like manner, as was alleged; the defendant was bound to use it "in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle."

In an earlier case, cited as authority for this decision, the same court went much farther, and applied the

test of reasonable use where it was conceded that the plaintiff had suffered damage. *Wadsworth v. Tillotson*, 15 Conn. 366. In this case the defendant had brought water by an aqueduct from the common stream to her house for domestic and culinary purposes; and instead of returning the surplus, above what was necessary for such use, to the stream, she allowed it to escape by flowing through small apertures in penstocks, in order to keep the water from freezing in winter and becoming impure in summer. Part of this water irrigated the land, and part went to waste. It was held that these facts gave the plaintiff no right of action. See also *Chatfield v. Wilson*, 31 Vt. 358.

It was for some time a doubtful question in England whether water could be diverted from streams for purposes of irrigation (*Wood v. Waud*, 3 Ex. 748, 781); but it is now settled that it may be so used in proper cases. *Embrey v. Owen*, 6 Ex. 353; *Miner v. Gilmour*, 12 Moore P. C. 131. And in the latter case (which involved rights of mill-owners) the test of damage or not was rejected, and that of reasonable use adopted. Lord Kingsdown, in delivering the judgment, said: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream." See *Nuttall v. Bracewell*, Law R. 2 Ex. 1, 9.

In cases involving the privileges of mill-owners, the rule seems to be well

settled, in accordance with the doctrine of the principal case, *Springfield v. Harris*, that the true test of liability is whether, under all the circumstances, considering the size of the stream and that of the mill-works, there has been a greater use of the stream, in abstracting or detaining the water, than is reasonably necessary and usual in similar establishments for carrying on the mill. See *Davis v. Getchell*, 50 Maine, 602; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Pitts v. Lancaster Mills*, 13 Met. 156; *Merrifield v. Worcester*, 110 Mass. 216; *Hayes v. Waldron*, 44 N. H. 580; *Snow v. Parsons*, 28 Vt. 459; *Pool v. Lewis*, 41 Ga. 162; *Timm v. Bear*, 29 Wis. 254; *Clinton v. Myers*, 46 N. Y. 511.

There is no suggestion that these cases stand upon peculiar grounds, and it is difficult to see any distinction between the case of mill privileges and other privileges of using the water of streams, except in so far as a difference has been made by statute. See *Gould v. Boston Duck Co.*, 13 Gray, 442, 450. It must frequently be impossible to know that a particular use of the water may not injure the lower proprietors. Suppose, for instance, in the case of a brook, that at a time when the lower proprietor is in great need of the water, the necessities of the upper proprietor are also greater than usual, and, without surpassing the bounds of what is reasonably necessary for a proper purpose, he exhausts the supply of the brook, and a drought follows: shall the upper proprietor be held liable in view of what he may not have known (the needs of his neighbor), and what he could not foresee (the drought), the act which he did being one which was usual among the riparian owners?

The French law does not give such

extensive water privileges, even to mill-owners. "Le propriétaire d'un moulin ne peut, sous prétexte que toute l'eau lui est nécessaire, empêcher les propriétaires supérieurs de s'en servir ou en priver ses voisins." 1 Fournel, *Du Voisinage*, 392 (4th ed.). And the reason given is, that mills, though useful to the public, are not to be preferred to the irrigation of the land.

In the Pacific States the rights of prior occupants are much greater. Thus, it is held in California that the person who first appropriates, for mining or other purposes, the waters of a stream running in the public lands is entitled to the same, to the exclusion of all subsequent appropriations by other persons for the same or for other purposes. *Smith v. O'Hara*, 43 Cal. 371. But, if the first occupant appropriate only part of the water, another may appropriate the rest; or, if he take all only upon certain days of the week, another may take all upon other days. 1b. The appropriation must, however, be for some "useful purpose," present or in contemplation, and is not permitted for speculation: *Weaver v. Eureka Lake Co.*, 15 Cal. 271; or for drainage simply: *McKinney v. Smith*, 21 Cal. 374. See also *McDonald v. Bear River Co.*, 13 Cal. 220; *Wixon v. Water & Mining Co.*, 24 Cal. 367; *Hill v. Smith*, 27 Cal. 476.

The water of a stream, running wholly within a man's land, may be diverted, as for the purpose of irrigation, if it be returned to its channel before reaching the lower proprietor. *Tolle v. Correth*, 31 Tex. 362. And this is the French law. "Celui dont cette eau traverse l'héritage peut même en user dans l'intervalle qu'elle y parcourt; mais à la charge de la rendre à la sortie de ses fonds à son cours

ordinaire." Code Civil, art. 644. The Grand Coutumier de Normandie, art. 206, contained a similar provision, adding the qualification that no damage should be done to another.

If the water passes between the lands of riparian owners, this diversion of course cannot be allowed, as each proprietor owns to the middle of the stream, if not navigable. In the French law, however, the courts, in the interest of agriculture, are allowed to modify this rule in certain cases. Where the supply of the water is not sufficient for all the proprietors, it is allowed them to take all of it in succession, one after another, during a time proportioned to their needs. 1 Fournel, *Du Voisinage*, p. 391 (4th ed.). This is somewhat like the law of California, *supra*.

There is another wise rule of the French law, that this right of diverting water which passes through a man's land is applicable only to proper water-courses. If there are canals passing through a man's land, for carrying water to a lower proprietor, the former cannot divert the water for any purpose. 1 Fournel, *Du Voisinage*, p. 395 (4th ed.).

(c.) *Grant and Prescription*.—A person by grant or prescription can, of course, acquire greater rights to the water of streams than those indicated by the terms "usufruct" and "reasonable use" (as applied to define the ordinary rights of upper and lower proprietors); but *quære* as to a right arising merely from the enjoyment, in its own natural bed, of a stream which rises in the land of the defendant. We have not found any direct authorities upon this question in the English law. By the French law no such right can be thus acquired. Fournel says distinctly that the right of disposing of a man's

spring or rain water cannot be weakened "by the possession" of the neighboring land-owners. 1 *Du Voisinage*, § 95, pl. 1. And he refers to a curious case, with which he says that all the authorities are in accord. The case was this: One Miss Antoinette Brossette was owner of land in which were two springs, which for more than fifty years had flowed down upon the neighboring estates. Having built a mill at some distance, she diverted the water of these springs towards a river which supplied the mill. This act disturbed Claude Faure, a lower land-owner, who had made use of the water of the springs for irrigating his meadow and running his mill. He therefore brought an action against Miss Brossette; alleging that for upwards of fifty years, by himself and others, he had been in possession of this watercourse, whereby he had acquired the use of it by prescription. Miss Brossette answered that the enjoyment of the water which proceeds from upper lands cannot be the basis of a prescription in favor of the lower estates, *because that possession was more the result of the locality than of the consent of the upper owner*; that in law it was true that a person could acquire a servitude without grant, but that by act of man in the particular case (*mais, ex facto hominis, que dans l'espèce*) there had been nothing done or consented to from which it could be presumed that the owner of the spring had given up her rights. The lower court gave judgment for Faure, and ordered the destruction of the new canal which Miss Brossette had made, and the return of the water to its ancient course. Upon appeal, M. de Chamillard, counsel for Miss Brossette, confined himself to this proposition, that the possession of Faure was wholly the effect of the natural sit-

uation of the place, without any concurrence or intervention of the will of the upper owners. Judgment *du parlement de Paris*, July 10, 1619, permitting Miss Brossette to conduct the water of her springs wherever she pleased.

This, of course, proceeds upon the ground that a man owns absolutely all the water which springs up out of his own land; and that he cannot be dispossessed of it by mere lapse of time. There must either be a grant or some other act or omission which indicates a surrender of the exclusive right. But twenty years' diversion of the stream by the lower proprietor, or the use of it to supply an ancient mill, would probably raise a prescriptive right in our law, whether a mere enjoyment of the stream in its natural state would do so or not.

If, by our law, a right to the use of water flowing from a spring may be acquired in the manner claimed by the plaintiff in the above case, against the owner of the land in which the spring rises, may it also be acquired by mere occupancy and ownership of the lower land, without regard to length of time, and without grant? In other words, has the owner of the soil an absolute ownership of the water flowing down from all the springs in it? It would seem that he has. Certainly, when the water of a spring first emerges from the soil, the owner of the land cannot be prevented from using all of the water, or consuming all of it, at his pleasure; and it follows that no one else can acquire a right to the use of it, except by grant or prescription.

The French case, it will be observed, did not decide that a right by prescription to the use of the water could not be acquired; on the contrary, counsel for the defence admitted that it could

be so acquired. The decision simply was, that a prescriptive right could not be acquired in the manner contended for by the plaintiff.

On the following page from that above referred to, M. Fournel explains what is meant in the French law by prescription. It only arises, he says, in cases where there is something from which the consent of the upper owner may be inferred. He refers to art. 642 of the Code Civil, where prescriptions of this kind are declared to arise only by an uninterrupted enjoyment for thirty years, beginning from the moment when the owner of the lower land has made and finished *visible works* designed to facilitate the descent and course of the water in his land.

In *Rawstron v. Taylor*, 11 Ex. 369, there had been a spot on the defendant's land, as long as any one could recollect, where water had ever, but inconstantly, risen to the surface. There had generally been a drinking-place for cattle there; and the overflow of water had run down in a ditch, and thence into a watercourse to the plaintiff's reservoir. It was held that the defendant was not liable for diverting this water to the use of his own land. Had the spring in this case been a constant one, so as to have produced a true watercourse, the case would have been like that decided by the French court. But as the decision went upon the ground that the water had no defined course, and was inconstant, the point above considered is left in doubt. See also *Broadbent v. Ramsbotham*, 11 Ex. 602, a similar case.

Sub-surface Water.—This leads us to a consideration of the right to cut off sub-surface water. Upon this point we shall find that there is little if any difference between our own and the Roman

and French law. M. Fournel says that the owner of land may cut the *veins* of springs, to the injury of the lower estates. 1 *Du Voisinage*, § 95, pl. 1. This principle is founded upon the rule of the Digest. “Si in meo fundo aqua erumpat, quæ ex tuo *venas* habeat, si eas *venas* incideris, et ob id desierit aqua ad me pervenire, tu non videris vi fecisse, si nulla *servitus* mihi eo nomine *debita* sit.” Lib. 39, tit. 3, 21.

We shall see that in our law no servitude, at least by prescription, can be acquired in sub-surface water which percolates through the ground; but it is considered to be otherwise of underground water running in definite currents, which, perhaps, is what the Digest means by the word “*venæ*.”

As to this right to cut off underground water, there was formerly some conflict among the English authorities. In *Balston v. Bensted*, 1 Camp. 468, an action was brought against the defendant for cutting a drain in his close, whereby the supply of water in a certain spring upon the close of the plaintiff was injuriously diminished. It appeared that the plaintiff had had uninterrupted enjoyment of the spring for upwards of twenty years; and Lord Ellenborough held that an exclusive enjoyment of water for a period of twenty years afforded a conclusive presumption of right in the party so enjoying it.

Acton v. Blundell, 12 Mees. & W. 324, was a similar case, except that the plaintiff had not been in possession for twenty years. The plaintiff was possessed of a well which the defendants, in carrying on mining operations in their land, had drained. It was held in the Exchequer Chamber that the defendants were not liable. This case underwent great consideration; the English authorities, ancient and mod-

ern, and the doctrines of the Roman law, being exhaustively reviewed. But the court expressed no opinion as to what would have been the decision had the plaintiff shown an uninterrupted user for twenty years.

In *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282, the defendants had sunk a well (after there had been disputes and compromises between the parties concerning the abstraction of water from the plaintiffs' ancient mills) on their own land, and erected over it a pump and steam-engine, by which they pumped up a quantity of underground water which would otherwise have flowed through the ground into certain streams and supplied the mills of the plaintiffs with water. It was held that the defendants were liable for the damage. But, though the mills of the plaintiffs were ancient, the court thought that that fact was not important. "We consider it as settled law," it was said, "that the right to have a stream running in its natural course is, not by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*,¹ . . . and an incident of property, as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighboring proprietor, who cannot dig so as to deprive it of the support of his land." This was said, apparently, with reference to underground water as well as to surface streams; for the court proceeded to say, "But in the much-considered case of *Acton v. Blundell*, in the Court of Exchequer Chamber, a distinction is made

for the first time between underground waters and those which flow on the surface; and it was held that the owner of a piece of land, who has made a well in it, and thereby enjoyed the benefit of underground water, but for less than twenty years, has no right of action against a neighboring proprietor, who, in sinking for and getting coals from his soil in the usual and proper manner, causes the well to become dry. The decision goes no further." And the case was thus explained: "In such a case the existence and state of underground water is generally unknown before the well is made; and after it is made there is a difficulty in knowing certainly how much, if indeed any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to that of his neighbor, who, in digging a mine or another well, may possibly be only taking back his own. . . . If the course of a subterranean stream were well known, as is the case with many which sink under ground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." These, and other remarks as to abstracting the water of surface streams, appear to have been applied, by way of illustration, to certain water which the defendants had taken after it

¹ This probably means simply that a lower proprietor can maintain an action against his neighbor above for diverting or polluting the stream to his injury without alleging a right to receive it as before for twenty years. It does not mean that an upper proprietor cannot acquire a right by prescription to divert or abstract large quantities of the water, or to pollute the stream.

had formed part of the river which supplied the mills. The digging of the well was considered as a diversion of the stream, and not as a reasonable use of it. But the same ruling was made as to underground water which had *not* reached the river, but had been prevented from doing so by the excavation of the well; and this, too, "whether the water was part of an underground watercourse or percolated through the strata." No reasons at all are given for this position; and, in view of what was said concerning *Acton v. Blundell*, it seems quite unintelligible.

The question went to the House of Lords in *Chasemore v. Richards*, 7 H. L. Cas. 349; s. c. 5 Hurl. & N. 982, Am. ed. In this case a land-owner and mill-owner, who had for upwards of sixty years enjoyed the use of a stream which was chiefly supplied by percolating underground water, produced by rain-falls, lost the use of the stream after an adjoining owner had dug, on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district (many of whom had no title as land-owners to the use of the water). It was held that he had no remedy; the judgment of the Exchequer Chamber (2 Hurl. & N. 168) being affirmed.

The opinion expressed by Lord Ellenborough in *Balston v. Bensted*, *supra*, as to the prescriptive right to such water, was now overruled, and its inconsistency with *Dickinson v. Grand Junction Canal Co.*, *supra*, pointed out. But this latter case was itself criticised in that the judges had failed to follow the distinction between underground percolating water and visible watercourses, as laid down in *Acton v. Blundell*, and commended by themselves.

Upon the question of prescription,

the court, in *Chasemore v. Richards*, 7 H. L. Cas. 349, 370, say: "In such a case as the present, is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiff's mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendants' or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water?"

There is, then, according to the highest authority in England, no such thing as a prescriptive right to underground percolating water, such as is produced by rainfall or the natural moisture of the soil; and the same case (*Chasemore v. Richards*) also decides that a party has no valid claim to such water (so as to be able to maintain an action for cutting it off) *jure naturæ*. It was impossible, the court observed, to reconcile such a right with the natural and ordinary rights of land-owners, or to fix any reasonable limits to the exercise of such a right. Such a right would interfere with, if not prevent, the drainage of land by the owner. And this case was put: Suppose a man should sink a well upon his land which should not affect his neighbor's mill; in that case

no action could be maintained. But suppose that many land-owners should sink wells upon their lands, and thereby absorb so much of the percolating water as would sensibly and injuriously diminish the quantity of water at the mill, could an action be maintained against any one of them, and, if any, which? for it is clear that no action could be maintained against them jointly.

Lord Wensleydale (better known as Mr. Baron Parke) hesitated, however, as to the application of the rule to the particular case, though he assented to the correctness of the general principle; doubting if the defendant had any right to pump out water for the whole neighborhood, including those who would themselves have had no right to take it. See *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569, *infra*.

Our courts have generally reached the same conclusions with those arrived at in *Chasemore v. Richards*. *Chase v. Silverstone*, 62 Maine, 175; *Greenleaf v. Francis*, 18 Pick. 117; *Wilson v. New Bedford*, 108 Mass. 261; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 49; *Ellis v. Duncan*, 21 Barb. 230; *Wheatley v. Baugh*, 25 Penn. St. 528; *Frazier v. Brown*, 12 Ohio St. 294; *Delbi v. Youmans*, 50 Barb. 316; *Bliss v. Greely*, 45 N. Y. 671; *Mosier v. Caldwell*, 7 Nev. 363; *Hanson v. McCue*, 42 Cal. 303. But see *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439, where the unqualified right of the land-owner to cut off percolating water was rejected, and the doctrine of a right to do so in the reasonable use of the soil adopted.

The rule, except in New Hampshire, seems, therefore, to be that land-owners have an unqualified right to underground percolating water, just as they

have to the very soil itself (and so the doctrine is expressly stated in many of the cases), and not the mere right to a reasonable use of it. The right is like that to the appropriation of surface water not running in defined channels, and not like that to the water of regular streams. But a land-owner would probably have no right to corrupt underground water to the injury of his neighbor.

In *Frazier v. Brown*, *supra*, it was held that it made no difference that the defendant had acted with mere malice in cutting off the subterraneous water. And to the same effect are *Chatfield v. Wilson*, 28 Vt. 49; *Rawstron v. Taylor*, 11 Ex. 369, 378, *Martin, B.* But this is not clear. The doctrine of the Roman law, as we have seen, was otherwise; and so is that of *Greenleaf v. Francis*, 18 Pick. 117, and *Wheatley v. Baugh*, 25 Penn. St. 528, 533. See also *Chasemore v. Richards*, 7 H. L. Cas. 349, 388; *Panton v. Williams*, 19 Johns. 92; *Radcliff v. Brooklyn*, 4 Comst. 195, 204; *Goodloe v. Cincinnati*, 4 Ohio, 500.

The distinction suggested in *Dickinson v. Grand Junction Canal Co.*, *supra*, between underground water which percolates through the soil and that which runs below the surface in a defined channel, is recognized in other cases. See *New River Co. v. Johnson*, 2 El. & E. 435, 445, *Crompton, J.*; *Chasemore v. Richards*, 7 H. L. Cas. 349, 374; *Smith v. Adams*, 6 Paige, 435; *Wheatley v. Baugh*, 25 Penn. St. 528; *Cole Silver M. Co. v. Virginia Water Co.*, 1 Sawyer, 470. And so of underground ditches. See *Livingston v. McDonald*, 21 Iowa, 160, 165, showing, also, the difference between ditches for drainage and streams having banks. *Luther v. Winnisimmet Co.*, 9 Cush.

171, 174; *Ashley v. Wolcott*, 11 Cush. 298; *O'Riley v. McCheeney*, 3 Lans. 192; *Gillett v. Johnson*, 30 Conn. 180; 278; *Merrifield v. Worcester*, 110 Hoyt v. Hudson, 27 Wis. 656; *Broadbent v. Ramsbotham*, 11 Ex. 602; 3 Kent's Com. 440, note 1 (12th ed.). See further, as to drainage, *Waffle v. New York, &c., R. Co.*, 58 Barb. 413.

If a well or an excavation withdraws water from a defined surface channel, as well as subterraneous percolations, an injunction may be obtained. *Grand Junction Canal Co. v. Shugar*, Law R. 6 Ch. 483. See *Dickinson v. Grand Junction Canal Co.*, *supra*.

Of course if the water of a stream, whether above or below ground, be polluted so as to work an injury to a lower proprietor, he can maintain an action therefor, unless the upper proprietor has acquired a right by grant or prescription to poison the water. See *Wheatley v. Chrisman*, 24 Penn. St.

The last-named case was an action against a city for polluting the water of a stream by sewage, and it was decided that so far as the pollution was the effect of the system of sewage adopted by the defendant, it was not actionable; otherwise, if the pollution was attributable to the negligence of the defendants, either in managing the system or in the construction of the sewers. And a municipal corporation has, it is held, the like right to cause the water collecting in the gutters of buildings and streets to flow upon land, its natural outlet, in a single stream, when otherwise it would have flowed over the land in small currents. *Phin- izey v. Augusta*, 47 Ga. 260. See *Hough v. Doylestown*, 4 Brewst. 333.

SUPPORT OF GROUND AND BUILDINGS.

THURSTON v. HANCOCK, leading case.

HUMPHRIES v. BROGDEN, leading case.

Note on Supports.

Lateral support of ground and houses.

Support of contiguous houses.

Party walls.

Subjacent support.

WILLIAM THURSTON v. EBENEZER HANCOCK and Others.

(12 Mass. 220. Supreme Court, Massachusetts, March Term, 1815.)

Lateral Support. Where one built a house on his own land within two feet of the boundary line of his land, and ten years after the owner of the land adjoining dug so deep into his own land as to endanger the house, and the owner of the house, on that account, left it and took it down, it was holden that no action lay for the owner of the house for the damage done to the house, but that he was entitled to an action for the damage arising from the falling of his natural soil into the pit so dug.

THIS was an action of the case, in which the plaintiff declares that long before the several grievances afterwards mentioned, and at the several times of committing the same, he was, and thence hitherto hath been, and still is, seized in fee of a certain messuage or dwelling-house and land, with the appurtenances, in Boston, and which were in his possession and occupancy, and he had, and still ought to have, the full, safe, and secure use and enjoyment of the same; nevertheless, the defendants, well knowing the premises, but maliciously contriving and intending to hurt the plaintiff in this behalf, and to deprive him of the use and benefit of the said dwelling-house, on, &c., and on divers other days and times between that day and the day of suing his original writ in this behalf, at Boston aforesaid, wrongfully and injuriously took, dug, and carried away the earth, ground, and soil from the land next adjoining the plaintiff's said dwelling-house and land, to a great depth, that is to say, to the depth of sixty feet below the ancient surface of the said next adjoining land, and below the foundation of the plaintiff's said dwelling-house, and so near and

so close to the said dwelling-house and land, that the ground, earth, and soil of the plaintiff was undermined, and hath fallen away from around his said dwelling-house, and from his land on which the same are situated ; so that the cellar walls thereof have been left naked and exposed ; by reason whereof the plaintiff hath been, and still is, greatly prejudiced and injured in his aforesaid estate, of and in the said dwelling-house and land, and the same is become of no value to him, and the said house hath been, and still is, in great danger of being thereby undermined and of falling down, and hath been thereby rendered wholly unsafe and insecure to dwell in, and of no use or benefit to the plaintiff, and by reason of the premises he hath been obliged to quit said house and to leave the same empty and untenanted, and been put to great trouble and expense, and hath been, and still is, deprived of all benefit, use, and enjoyment thereof, by means and on account of the premises. To his damage \$20,000.

A trial was had upon the issue of not guilty, November term, 1813, and a verdict found for the defendants was to be set aside, and a new trial granted, if, in the opinion of the court, the plaintiff was entitled to maintain his action upon the following state of facts reported by the judge who sat in the trial, namely: that the plaintiff, in the year 1802, purchased a parcel of land upon Beacon Hill, so called, in Boston, bounded westwardly on land belonging to the town of Boston, on the said hill, eastwardly on Bowdoin Street, so called, and northwardly and southwardly on land of D. D. Rogers, Esq. ; that afterwards, in the year 1804, the plaintiff erected a valuable brick dwelling-house thereon, which stood at the distance of forty feet from the northern and southern bounds of his land, the back side of the said house being about two feet from the western bounds of said land ; that the foundation of said house was placed about fifteen feet below the ancient surface of the land ; that the plaintiff, with his family, occupied the said house and land from the month of December, 1804, until they were obliged to remove therefrom, as hereafter mentioned ; that the defendants commenced digging and removing the gravel from the side of the said hill in the year 1811 ; that on the 27th of July, 1811, the plaintiff gave them written notice that his house was endangered thereby ; that the defendants, notwithstanding, continued to dig and carry away the earth and gravel from the hill, until the commencement of

this action; that the only land belonging to the defendants, which adjoined to the said house and land of the plaintiff, was purchased by them of the town of Boston, and conveyed by deed dated the 6th of August, 1811; that the land thus bought by the defendants consisted of a lot about one hundred feet square, upon the top of said Beacon Hill, and a right in a highway thirty feet wide, leading to it from Sumner Street; that this lot and highway were laid out by said town more than sixty years since, for the purpose of erecting a beacon, and have never been used for any other purpose, except the erection of a monument; that the town derived its title to said land from long-continued possession for the purpose aforesaid; that all these facts were known to the defendants before they purchased said land of the town; that this land adjoined the plaintiff's house and land on the western side, and, at the time of suing out the plaintiff's writ, the defendants' digging and removal of the earth as aforesaid had approached, on the surface, within five or six feet of the plaintiff's house on the western side thereof, and in some places the earth had, by reason of said digging and removal, fallen from the walls thereof; that the defendants had dug and carried away the earth near the northwestwardly corner of said house to the depth of forty-five feet, and on the western side thereof to the depth of thirty feet, below the natural surface of their own, as well as of the plaintiff's land; that the earth dug and removed by the defendants as aforesaid was upon and from their said land next adjoining the plaintiff's land; that, by reason of the digging and removing of the earth as aforesaid, to the depth aforesaid, below the ancient surface of the earth, a part of the plaintiff's earth and soil, on the surface of his said land, had fallen away and slidden upon the defendants' land; and the foundation of the plaintiff's house was rendered insecure, and it became, and was, at the time of commencing this action, unsafe and dangerous to dwell in said house; and the plaintiff was obliged to quit and abandon the same, previous to his commencing this action, and afterwards to take it down in order to save the materials thereof.

The cause was argued at the last March term, by *Otis* and *Prescott* for the plaintiff, and the *Solicitor-General* and *Aylwin* for the defendants; and, being continued for advisement, the opinion of the court was now delivered by

PARKER, C. J. The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss; but, after all the researches we have been able to make, we cannot satisfy ourselves that the facts reported will maintain this action.

The plaintiff purchased his land in the year 1802, on the summit of Beacon Hill, which has a rapid declivity on all sides. In 1804, he erected a brick dwelling-house and out-houses on this lot, and laid his foundation, on the western side, within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession for more than sixty years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the 6th of August, 1811, the defendants purchased of the town the land situated westwardly of the said lot owned by the plaintiff; and, in the same year, commenced levelling the hill, by digging and carrying away the gravel; they not actually digging up to the line of division between them and the plaintiff, but keeping five or six feet therefrom. Nevertheless, by reason of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation wall bare, and so to endanger the falling of his house as to make it prudent and necessary, in the opinion of skilful persons, for the safety of the lives of himself and his family, to remove from the house; and, in order to save the materials, to take down the house, and to rebuild it on a safer foundation. The defendants were notified of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages, in case of any loss.

The manner in which the town of Boston acquired a title to the land, or to the particular use to which it was appropriated, can have no influence upon the question, as the fee was in the town, without any restriction as to the manner in which the land should be used or occupied.

It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it.

The law, founded upon principles of reason and common util-

ity, has admitted a qualification to this dominion, restricting the proprietor so to use his own as not to injure the property or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas*. Thus, no man, having land adjoining his neighbor's which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbor's house,¹ or expose it to injury from the weather or to unwholesome smells.

But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired. Therefore it is, that, by the ancient common law, no man could maintain an action against the owner of an adjoining tract of land, for interrupting the passage of the light or the air to a tenement unless the tenement thus affected was ancient, so that the plaintiff could prescribe for the privilege of which he had been deprived, upon the common notion of prescription, that there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued.

Now, in such case of a grant presumed, it shall for the purposes of justice be further presumed that it was from the ancestor of the man interrupting the privilege, or from those whose estate he has; so as to control him in the use of his own property, in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common-law principle which gives one neighbor an action against another, for making the same use of his property which he has made of his own. And it is a reasonable principle; for it would be exceedingly unjust that successive purchasers or inheritors of an estate for the space of sixty years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted, or consented to, or acquiesced in, the use of the privilege.

It is true, that, of late years, the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than sixty years. But the same principle is preserved of the presumption of a grant. And, indeed, the modern

¹ See *post*, p. 558.

doctrine, with respect to easements and privileges, is but a necessary consequence of late decisions, that grants and title-deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription.

The plaintiff cannot pretend to found his action upon this principle; for he first became proprietor of the land in 1802, and built his house in 1804, ten years before the commencement of his suit. So that, if the presumption of a grant were not defeated by showing the commencement of his title to be so recent, yet there is no case, where less than twenty years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued use of privileges, the full enjoyment of which necessarily trenches upon his neighbor's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one, which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house; and, indeed, they could not have remained so long, without the culpable negligence or friendly acquiescence of those who might originally have had a right to hinder or obstruct them. But a man who himself builds a house adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land, and, by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience.

This seems to be the result of the cases anciently settled in England, upon the substance of nuisance or interruption of privileges and easements; and it seems to be as much the dictate of common sense and sound reason as of legal authority.

The decisions cited by the counsel for the plaintiff, 1 Domat, 309, 408; Fitz. N. B. 183; 9 Co. 59; Palmer, 536; 1 Roll. Abr. 140; *ib.* 430; *Slingsby v. Barnard*, 1 Roll. Rep. 88; 2 Roll. Abr. 565; 2 Saund. 697; Co. Lit. 56 *b*; 1 Burr. 337; 6 D. & E. 411; 7 East, 368; 1 B. & P. 405; 3 Wils. 461, in support of this action, generally go to establish only the general principle, that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil-law doctrine cited from Domat will be found, upon examination, to go no further than the common law upon the subject. For, although it is there laid down that new works on a man's ground

are prohibited, provided they are hurtful to others who have a right to hinder them, and that the person erecting them shall restore things to their former state, and repair the damages, from whence, probably, the common-law remedy of abating a nuisance as well as recovery of damages, yet this is subsequently explained and qualified in another part of the same chapter, where it is said, that, if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title, or possession, he is not liable to damage for injurious consequences, unless he does it, not for his own advantage, but maliciously; and the damages shall be considered as casualties for which he is not answerable.

The common law has adopted the same principle, considering the actual enjoyment of an easement for a long course of years as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

The only case cited from common-law authorities, tending to show that a mere priority of building operates to deprive the tenant of an adjoining lot of the right of occupying and using it at his pleasure, without being subjected to damages, if by such use he should injure a building previously erected, is that of *Slingsby v. Barnard*, cited from Rolle. Sir John Slingsby brought his action on the case against Barnard and Ball, and declared that he was seized of a dwelling-house *nuper edificatus*, and that Barnard was seized of a house next adjoining; and that Barnard, and Ball under him, in making a cellar under Barnard's house, dug so near the foundation of the plaintiff's house, that they undermined the same, and one half of it fell. Judgment upon this declaration was for the plaintiff, no objection having been made as to the right of action, but only to the form of the declaration.

The report of this case is very short and unsatisfactory; it not appearing whether the defendant confined himself in his digging to his own land, or whether the house then lately built was upon a new or an old foundation. Indeed, it seems impossible to maintain that case upon the facts made to appear in the report, without denying principles which seem to have been deliberately laid down in other books, equally respectable as authorities.

Thus, in *Siderfin*, 167, upon a special verdict the case was thus. A., having a certain quantity of land, erected a new house upon part of it, and leased the house to B., and the residue of the land to C., who put logs and other things upon the land adjoining said

house, so that the windows were darkened, &c. It was holden that B. could maintain case against C. for this injury. But the reason seems to be, that C. took his lease seeing that the house was there, and that he should not, any more than the lessor, render the house first leased less valuable by his obstructions. It was, however, decided in the same case, that, if one seized of land lease forty feet of it to A. to build upon, and another forty feet to B. to build upon, and one builds a house, and then the other digs a cellar upon his ground, by which the wall of the first house adjoining falls, no action lies; and so, they said, it was adjudged in *Pigott & Surry's* case, for each one may make what advantage he can of his own. The principle of this decision is, that both parties came to the land with equal rights in point of time and title; and that he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident and provide against it by setting his house sufficiently within his line to avoid the mischief. In the same case it is stated, as resolved by the court, that, if a stranger have the land adjoining to a new house, he may build new houses, &c., upon his land, and the other shall be without remedy, when the lights are darkened; otherwise, when the house first built was an ancient one.

In *Rolle's Abridgment*, 565, A., seized in fee of copyhold estate, next adjoining land of B., erects a new house upon his copyhold land, and a part is built upon the confines next adjoining the land of B., and B. afterwards digs his land so near the house of A., but on no part of his land, that the foundation of the house, and even the house itself, fall; yet no action lies for A. against B., because it was the folly of A. that he built his house so near to the land of B. For by his own act he shall not hinder B. from the best use of his own land that he can. And, after verdict, judgment was arrested. The reporter adds, however, that it seems that a man, who has land next adjoining my land, cannot dig his land so near mine as to cause mine to slide into the pit; and, if an action be brought for this, it will lie.

Although, at first view, the opinion of Rolle seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall

answer in damages ; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor. For, in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest.

If this be the law, the case before us is settled by it ; and we have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be.

The plaintiff purchased his land in 1802. At that time the inhabitants of Boston were in possession and the owners of the adjoining land now owned by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril ; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him. He could not have maintained an action for obstructing the light or air ; because he should have known, that, in the course of improvements on the adjoining land, the light and air might be obstructed. It is, in fact, *damnum absque injuria*.

By the authority above cited, however, it would appear that for the loss of, or injury to, the soil merely, his action may be maintained. The defendants should have anticipated the consequences of digging so near the line ; and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

HUMPHRIES *v.* BROGDEN.

(12 Q. B. 739. Queen's Bench, England, Michaelmas Term, 1850.)

Subjacent Support. Action on the case by the occupier of the surface of land for negligently and improperly, and without leaving any sufficient pillars and supports, and contrary to the custom of mining in the country where, &c., working the subjacent minerals, *per quod* the surface gave way. Plea: Not guilty. It was proved on the trial that plaintiff was in occupation of the surface, and defendant of the subjacent minerals; but there was no evidence how the occupation of the superior and inferior strata came into different hands. The surface was not built upon. The jury found that the defendants had worked the mines carefully and according to custom, but without leaving sufficient support for the surface. *Held*, that the plaintiff was, on this finding, entitled to have the verdict; for that, of common right, the owner of the surface is entitled to support from the subjacent strata; and, if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state.

THIS was an action against the Durham County Coal Company, sued in the name of their secretary. On the trial before Coleridge, J., at the Durham Spring Assizes, 1850, the jury, in answer to questions put by the learned judge, found the facts specially. His lordship then directed a verdict for the plaintiff, giving the defendants leave to move to enter a verdict for them upon the findings of the jury.

Knowles, in Easter Term, 1850, obtained a rule *nisi* accordingly. In Trinity Term, 1850,¹ *Watson* and *Joseph Addison* showed cause, and *Knowles* and *Hugh Hill* supported the rule. The judgment of the court states so fully the nature of the case, the pleadings, and the arguments and authorities adduced on both sides, as to render any farther statement unnecessary. *Cur. adv. vult.*

LORD CAMPBELL, C. J., now delivered the judgment of the court.

This is an action on the case. The declaration alleges that the plaintiff was possessed of divers closes of pasture and arable land, situate, &c., yet that the company, so wrongfully, carelessly, negligently, and improperly, and without leaving any proper and sufficient pillars or supports in that behalf, and contrary to the custom and course of practice of mining used and approved of in

¹ On the 23d and 24th of May, 1850. Before Lord Campbell, C. J., Patterson, Coleridge, and Erle, JJ.

the country where the mines thereafter mentioned are situate, worked certain coal-mines under and contiguous to the said closes, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, that, by reason thereof, the soil and surface of the said closes sank in, cracked, swagged, and gave way; and thereby, &c. The only material plea was not guilty.

The cause coming on to be tried before my brother Coleridge at the last spring assizes for the county of Durham, it appeared that the plaintiff was possessed of the closes described in the declaration, and that the Durham County Coal Company (who may sue and be sued by their secretary) were lessees, under the Bishop of Durham, of the coal-mines under them; but there was no other evidence whatever as to the tenure or the title either of the surface or of the minerals. It appeared that the company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that, supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly, or negligently, or contrary to the custom of the country. The jury found that the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports; and a verdict was entered for the plaintiff for £110 damages, with leave to move to enter a verdict for the defendant if the court should be of opinion that, under these circumstances, the action was not maintainable.

The case was very learnedly and ably argued before us in Easter and Trinity terms last. On account of the great importance of the question, we have taken time to consider of our judgment.

For the defendant it was contended that, after the special finding of the jury, the declaration is defective in not alleging that the plaintiff was entitled to have his closes supported by the subjacent strata. But we are of opinion that such an allegation is unnecessary to raise the question in this action, whether the company, although they did not work the mines negligently or contrary to the custom of the country, were bound to leave props to support the surface. If the easement which the plaintiff claims exists, it does not arise from any special grant or reservation, but is of common right, created by the law, so that we are

bound to take notice of its existence. In pleading it is enough to state the facts from which a right or a duty arises. The carefully prepared declaration in *Littledale v. Lord Lonsdale*, H. Bl. 267, for disturbing the right of the owner of the surface of lands to the support of the mineral strata belonging to another, contains no express allegation of the right; and, if the omission had been considered important, it probably would have been relied upon, rather than the objection that a peer of Parliament was not liable to be sued in the Court of King's Bench by bill.

We have, therefore, to consider, whether, when the surface of land (by which is here meant the soil lying over the minerals) belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state. This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by the erection of buildings; for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the globe subsisted in its present form.

Where portions of the freehold, lying one over another perpendicularly, belong to different individuals, and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But, in the case of adjoining closes which belong respectively to different persons from the surface to the centre of the earth, the law of England has long settled the degree of lateral support which each may claim from the other; and the principle upon which this rests may guide us to a safe solution of the question now before us.

In 2 Rolle's Abridgment, 564, tit. Trespass (1), pl. 1, it is said: "If A., seized in fee of copyhold land next adjoining land of B., erect a new house on his copyhold land" (I may remark that the circumstance of A.'s land being copyhold is wholly immaterial), "and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., but not touching the land of A., whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A. against B., because this was the fault of A. himself that he built his house so near to

the land of B., for he could not by his act hinder B. from making the most profitable use of B.'s own land. Easter Term, 15 Car. B. R., *Wilde v. Minsterley*. But *semble* that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie." This doctrine is recognized by Lord C. B. Comyns, Com. Dig., Action upon the Case for a Nuisance (A); by Lord Tenterden, in *Wyatt v. Harrison*, 3 B. & Ad. 871, 876; and by other eminent judges. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, *sic utere tuo ut alienum non lædas*. As is well observed by a modern writer: "If the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone." Gale on Easements, p. 216.

This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed as much as after the expiration of twenty years, or any longer period. *Pari ratione*, where there are separate freeholds from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left; but, if the surface subsides, and is injured by the removal of these strata, although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property;

and under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule; and the attempt to introduce them would lead to uncertainty and litigation. Greater inconvenience cannot arise from this rule in any case than that which may be experienced where the surface belongs to one owner and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise to the parties and to the public.

Something has been said of a right to a reasonable support for the surface; but we cannot measure out degrees to which the right may extend; and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level.

The defendant's counsel have argued that the analogy as to the support to which one superficial close is entitled from the adjoining superficial close cannot apply where the surface and the minerals are separate tenements, belonging to different owners, because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But, in contemplation of law, all property in land having been in the Crown, it is easy to conceive that, at the same time, the original grant of the surface was made to one, and the minerals under it to another, without any express grant or reservation of any easement. Suppose (what has generally been the fact) that there has been in a subject unity of title from the surface to the centre; if the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals,

he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said that, if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the grantee from doing what he likes with his own: but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed; and a man must so use his own as not to injure his neighbor.

The books of reports abound with decisions restraining a man's act upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is, where the upper story of a house belongs to one man and the lower to another. The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant, why is not a similar grant or covenant to be implied in favor of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, conveying away the lower story only, is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?

I will now refer, in chronological order, to the cases which were cited in the argument; and I think that none of them will be found in any degree to impugn the doctrine on which our decision rests.

In *Bateson v. Green*, 5 T. R. 411, Buller, J., says: "Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the question is, Which of the two rights is subservient to the other?" And it was held that the lord may dig clay-pits on a common, or empower others to do so, without leaving sufficient herbage for

the commoners, if such right can be proved to have been always exercised by the lord. So, here, the right of the owner of the minerals to remove them may be subservient to the right of the owner of the surface to have it supported by them.

Peyton v. The Mayor, &c., of London, 9 B. & C. 725, was cited to show the necessity for introducing into the declaration an averment that the plaintiff was entitled to the easement or right which is the foundation of the action: but the easement there claimed was a right of support of one building upon another, which could arise only from a grant, actual or implied; and there Lord Tenterden says: "The declaration in this case does not allege as a fact that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allegation from which a title to such support can be inferred as a matter of law." In the case at bar, we are of opinion that the declaration alleges facts from which the law infers the right of support which the plaintiff claims.

Wyatt v. Harrison, 3 B. & Ad. 871, decided that the owner of a house, recently erected on the extremity of his land, could not maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down; but the reason given is, that the plaintiff could not, by putting an additional weight upon this land, and so increasing the lateral pressure upon the defendant's land, render unlawful any operation in the defendant's land which before would have caused no damage; and the court intimated an opinion that the action would have been maintainable, not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years. Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house. *Stansell v. Jollord*, 1 Selw. Ni. Pri. 457 (11th ed.), and *Hide v. Thornborough*, 2 Carr. & Kir. 250. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced

in by another who has the power to interrupt them ; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle.

In *Dodd v. Holme*, 1 A. & E. 493, where there is a good deal of discussion respecting the rights of owners of adjoining lands or houses, no point of law was determined, as the case turned upon the allegation in the declaration that the defendants dug "carelessly, negligently, unskilfully, and improperly," whereby "the foundations and walls" of the plaintiff's house gave way. The plaintiff's house was proved to have been in a very bad condition ; but Lord Denman said that the defendant had no right to accelerate its fall.

The Court of Exchequer, in *Partridge v. Scott*, 3 M. & W. 220, concurred in the law before laid down in this court, that a right to the support of the foundation of a house from adjoining land belonging to another proprietor can only be acquired by grant, and that, where the house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant ; but nothing fell from any of the judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's, not covered with buildings, had likewise sunk, in consequence of the defendant's operations in his own land ; but the court, in directing a verdict to be entered for the defendants on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the house, or would not have taken place if his own land had not been excavated.

The judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas, in *Chadwick v. Trower*, 6 New Ca. 1 (see *Trower v. Chadwick*, 3 New Ca. 334), that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall which rests upon it, and that he is not even liable for carelessly pulling down his wall, if he had not notice of the existence of the adjoining wall ; but this decision proceeds upon the want of any allegation or proof of a

right of the plaintiff to have his wall supported by the defendant's, and does not touch the right or obligation of conterminous proprietors, where the tenement to be supported remains in its natural condition.

Next comes the valuable case of *Harris v. Ryding*, 5 M. & W. 60, which would be a direct authority in favor of the present plaintiff if it did not leave some uncertainty as to the effect of the averment in the declaration, of working "carelessly, negligently, and improperly," and as to whether the plaintiff was considered absolutely entitled to have his land supported by the subjacent strata, to whatever degree the affording of this support might interfere with the defendant's right to work the minerals. There one seized in fee of land conveyed away the surface, reserving to himself the minerals, with power to enter upon the surface to work them; and it is said to have been held that, under this reservation, he was not entitled to take all the minerals, but only so much as "could be got, leaving a reasonable support to the surface." p. 70. The case was decided upon a demurrer to certain pleas justifying, under the reservation, and the declaration alleged careless, negligent, and improper working, which there must be considered as admitted, whereas here it is negatived by the verdict; but the barons, in the very comprehensive and masterly judgment which they delivered *seriatim*, seem all to have thought that the reservation of the minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them. Lord Abinger says: "The plea is no answer, because it does not set forth any sufficient ground to justify the defendant in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them." Parke, B., observes: "It never could have been in the contemplation of the parties that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal and let down the surface or injure the enjoyment of it;" and again: "This plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then state." "The question is," says Alderson, B., "whether the grantor is not to get the minerals which belong to him, and which he has reserved

to himself the right of getting, in that reasonable and ordinary mode in which he would be authorized to get them, provided he leaves a proper support for the land which the other party is to enjoy?" My brother Maule, then a judge of the Court of Exchequer, says, in the course of his luminous judgment: "The right of the defendants to get the mines is the right of the mine-owners, as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land." Parke, B., that he might not be misunderstood as to the right of the owner of the surface, afterwards adds: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support." It seems to have been the unanimous opinion of the court that there existed the natural easement of support for the upper soil from the soil beneath, and that the entire removal of the inferior strata, however skilfully done, would be actionable, if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed.

The counsel for the defendant cited and relied much upon the case of *Acton v. Blundell*, 12 M. & W. 324, in which it was held that a land-owner, who, by mining operations in his own lands, diverts a subterraneous current of water, is not liable to an action at the suit of the owner of the adjoining land, whose well is thereby laid dry. But the right to running water and the right to have land supported are so totally distinct, and depend upon such different principles, that there can be no occasion to show at greater length how the decision is inapplicable.

We have now to mention the case of *Hilton v. Lord Granville*, 5 Q. B. 701. A writ of error may probably be brought in this case,¹ when all the issues of fact have been disposed of; and nothing which I now say is to preclude me from forming any opinion upon it, should I ever hear it argued. If well decided, the plaintiff is justified in relying upon it; for it is strongly in point. This court there held that a prescription or a custom within a manor for the lord, who is seized in fee of the mines

¹ See 12 Q. B. 737, note.

and collieries therein, to work them under any dwelling-house, buildings, and lands, parcel of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation for the use of the surface of the lands, but without making compensation for any damage occasioned to any dwelling-houses or other buildings within or parcel of the manor by or for the purpose of working the said mines and collieries, is void as being unreasonable. Lord Denman, C. J., said: "A claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument."

The most recent case referred to was *Smith v. Kenrick*, 7 Com. B. 515, 564, in which the Court of Common Pleas, after great deliberation, held that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine, as far as the flow of water is concerned, in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so that such prejudice does not arise from the negligent or malicious conduct of his neighbor. But no question arose there respecting any right to support; the controversy being only respecting the obligation to protect an adjoining mine from water which may flow into it by force of gravitation. And in the very learned judgment of the court, delivered by my brother Cresswell, there is nothing laid down to countenance the doctrine that, in a case circumstanced like this which we have to determine, the owner of the minerals may, if not chargeable with malice or negligence, remove them so as to destroy or damage the surface over them which belongs to another.

We have attempted, without success, to obtain from the codes and jurists of others information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of

the land and the minerals under it into separate holdings being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined where we discover the right of adjoining proprietors of lands to support from lateral pressure leading to such minute regulations as the following: "*Si quis sepem ad alienum praedium fixerit, infoderitque, terminum ne excedito: si maceriam, pedem relinquito: si vero domum, pedes duos: si sepulchrum aut scrobem foderit, quantum profunditatis habuerint, tantum spatii relinquito: si puteum passus latitudinem.*" Dig. lib. x., tit. 1 (*Finium regundorum*), l. 13.

The Code Napoleon likewise recognizes the support to which the owners of adjoining lands are reciprocally entitled, but contains nothing which touches the question for our decision more closely than the following article on "*Natural Servitudes.*"¹ "*Les fonds inférieurs sont assujettis, envers ceux qui sont plus élevés, à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué.*" "*Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur.*" Code Civil, liv. 2, tit. iv. ch. 1, art. 640. But reference is here made to adjoining fields on a declivity, not to the surface of land and the minerals being held by different proprietors.

The American lawyers write learnedly on the support which may be claimed for land from lateral pressure and for buildings which have long rested against each other, but are silent as to the support which the owner of the surface of lands may claim from the subjacent strata when possessed by another. See Kent's Commentaries, part vi. lecture lii. vol. iii. p. 434, ed. 1840.

However, in Erskine's Institutes of the Law of Scotland, treating of the servitude *Oneris ferendi*, the very learned author has the following passage, which well illustrates the principle on which our decision is founded:—

"Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh," "the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight." "The proprietor of the ground story is obliged

¹ "*Servitudes qui dérivent de la situation des lieux.*"

to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." Book ii. tit. 9, s. 11, vol. i. p. 438 (Ivory's ed. 1828).

For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines; and that the rule to enter a verdict for the defendant must be discharged. We need hardly say that we do not mean to lay down any rule applicable to a case where the *prima facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title-deeds or by other evidence. *Rule discharged.*

Lateral Support of Ground and Houses.—What has been supposed (Gale, Easements, 342, 4th ed.) to refer to the lateral support of ground was very exactly defined in the Roman law. It was declared in the Digest, upon the authority of Gaius and the Twelve Tables, adopting a law of Solon, that if any one should build a wall he should leave a space of a foot between it and his neighbor's land; if a house, two feet. If he should dig a sepulchre or a ditch, he should leave a space equal to its depth; if a well, the distance (*latitudinem*) of a pace. And if he should plant an olive-tree or a fig-tree, he should leave nine feet; as to other trees, five. Lib. 10, tit. 1, 13.

But this space between estates required by the law of Rome and Greece was part of the *herctum*, *l'enceinte sacrée*, of the ancient family religion, and had nothing to do with lateral support. "Le même mur ne peut pas être commun à deux maisons; car alors *l'enceinte sacrée* des dieux domestiques aurait disparu. À Rome, la loi fixe à deux pieds et demi la largeur de l'espace libre qui doit toujours séparer deux maisons, et cette espace est consacré au 'dieu de l'enceinte.' La Cité Antique, par Coulanges, p. 66, cinq. ed. Ib. p. 72.

In the Code Civil of France, art. 674,

there is a minute provision as to support. It is as follows: Whoever digs a well or ditch near a wall, whether party or otherwise; whoever wishes to build against such wall a chimney, forge, or oven, to erect a stable against it, or establish a magazine of salt or any corrosive materials, must leave the interval prescribed by law and custom in this respect, or construct the works prescribed by law to prevent injury to his neighbor. Pardessus (*Traité des Servitudes*, 302) thus comments upon this article: "It appears to me that the principle of this article of the Code should be extended to numerous other cases which will undoubtedly be settled by particular enactments of the rural laws, and which, until such laws are made, should be decided in conformity with local usages, or, if they are silent, with the precepts of equity. . . . The owner of land who is desirous of quarrying on his own property for stone or sand, or similar materials, must not open the earth at the extreme point which separates his land from that of his neighbor, and continue to excavate perpendicularly, because his neighbor's land, thus deprived of support, would be in danger of falling in." See Gale, Easements, 342, 343 (4th ed.).

This is what is called the right of

support of land in its natural condition; and it is *prima facie* a right of property, analogous to the case of the right to make use of a natural stream or of the air. It is not in the nature of an easement, and does not depend upon prescription or grant. *Bonomi v. Backhouse*, El., B. & E. 646; s. c. 9 H. L. Cas. 508. But a right to remove this support may be acquired by grant: *Rowbotham v. Wilson*, 8 H. L. Cas. 348; though not by custom or prescription, because either would be oppressive and unreasonable. *Hilton v. Granville*, 5 Q. B. 701; *Broadbent v. Wilkes*, Willes, 360; s. c. 1 Wils. 63; *Wakefield v. Buccleuch*, Law R. 4 Eq. 613. (Where there is no express grant but one which is sought to be implied by usage, the law requires that the custom should not be unreasonable. *Salisbury v. Gladstone*, 9 H. L. Cas. 705, 709.)

The Court of Appeals of New York have gone still further and held that a municipal corporation, having authority from the legislature to grade streets, is not liable for injury resulting from taking away supporting ground from the plaintiff whereby his soil is precipitated into the street, though there be no superincumbent weight upon it. *Radcliff v. Brooklyn*, 4 Comst. 195. In this case there was no charge that the defendants had acted maliciously, or with want of skill or care. "The defendants," said Bronson, C. J., speaking for the court, "are a public corporation; and the act in question was done for the benefit of the public, and under ample authority if the legislature had power to grant the authority without providing for the payment of such consequential damages as have fallen upon the testator. Our constitution provides that private property shall not be taken for public use without just compensation. But I am

not aware that this, or any similar provision in the constitution of other States, has ever been held applicable to a case like this." In a subsequent part of his opinion, the learned Chief Justice said: "A man may do many things under a lawful authority, or in his own land, which may result in an injury to the property of others, without being answerable for the consequences. Indeed, an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow." (See *Quinn v. Paterson*, 3 Dutch. 35; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465. But see *Tinsman v. Belvidere R. Co.*, 2 Dutch. 148, 164, qualifying this proposition.) He also took occasion to criticise the *dictum* of Rolfe, referred to in the principal case, that a man cannot dig in his land so near mine as to cause mine to fall into his pit. The Chief Justice observed that if this doctrine were carried out to its legitimate consequences, it would often deprive men of the whole beneficial use of their property. An unimproved lot in a city would be worth little or nothing to the owner unless he were allowed to dig in it for the purpose of building. He thought the law had superseded the necessity of negotiating with one's neighbor for such purposes, and that it gave every man such a title to his own land that he might use it for all the purposes to which such lands are usually applied, provided he exercised proper care and skill to prevent any unnecessary injury to the adjoining land-owner.

This *dictum*, however, is denied by Prof. Washburn: 2 Real Prop. 331 (3d ed.); and by the Supreme Court of New York in *Farrand v. Marshall*, 21 Barb. 409, 414. See s. c. 19 Barb. 380. In this case (21 Barb. 416) it is stated that

the only point settled in *Radeliff v. Brooklyn* was, that a municipal corporation, acting under an authority, conferred by the legislature, to grade, level, and improve streets and highways, if they exercise proper care and skill, are not responsible for the consequential damages which may be sustained by those who own lands bounded by the street or highway. "The plaintiff and defendant," said the court in *Farrand v. Marshall*, "are adjoining land-owners in the city of Hudson. The land of the plaintiff, at its extremity, is in its natural state, and supported by the adjacent soil of the defendant." * It has always been thus laterally supported. It is a right of the plaintiff that he may enjoy his land in the condition in which it was placed by nature, and no one should be permitted to render his enjoyment of it insecure, or destroy it altogether by removing its natural support. The defendant has been and is engaged in excavating the soil on his own land, which supports the plaintiff's close, and has given notice to the plaintiff that he intends to pursue his excavations up to the line, and to an indefinite depth. Already the plaintiff's land has begun to subside; and, if the excavations are continued, it will fall over into the pit upon the defendant's land. The defendant's excavations are not made with the view of improving the land, or enjoying it in the manner that land is usually enjoyed. He is engaged in converting the earth that is removed into brick. He may do this, provided that he interferes not with the paramount right of others to the possession and enjoyment of their property, or the natural right which they possess to have their land surrounded and protected by the adjacent soil." (Brick-making may also be a nuisance from the particles of

dust emitted. *Walter v. Selfe*, 4 Giff. See note on Nuisance.)

The *dictum* of Bronson, C. J., is also denied in *McGuire v. Grant*, 1 Dutch. 356, 367, by the Supreme Court of New Jersey. The plaintiff was owner of a lot of land in the city of Trenton; and the defendant had made an excavation in his adjoining lot and thereby caused the injury complained of. The subject was elaborately examined, and the Chief Justice said that the decided weight of authority and sound principle concurred in support of the position that there was incident to land, in its natural condition, a right to support from the adjoining land; and that if the land should sink or fall away in consequence of the removal of such support, the owner was entitled to damages to the extent of the injury sustained. See also *Foley v. Wyeth*, 2 Allen, 131, where a recovery was had for an injury of this kind in a city, where no negligence was shown.

So, too, in *Bonomi v. Backhouse*, EL, B. & E., 646, 655, Willes, J., in delivering the judgment of the Exchequer Chamber, said: "The most ordinary case of withdrawal of support is in town property, where persons buy small pieces of land, frequently by the yard or foot, and occupy the whole of it with buildings." They generally excavate for cellars, and in all cases make foundations; and, in lieu of support given to their neighbor's land by the natural soil, substitute a wall. We are not aware that it has ever been considered that the mere excavation of the land for this purpose gives a right of action to the adjoining owner, and is itself an unlawful act, *although it is certain that if damage ensued a right of action would accrue.*"

The law, as understood in England,

has also been thus stated: As far as the mere support of the soil is concerned, such support has obviously been afforded as long as the land itself has been in existence; and in all those cases, at least, in which the owner of the land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, he has a right to the support of it, as an ordinary right of property (not as an easement), as being necessarily and naturally attached to the soil. The negation of this principle would be incompatible with the very security for property, as it is obvious that, if the neighboring owners might excavate their soil on every side, up to the boundary line, to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone. Gale, *Easements*, 336 (4th ed.), a passage often quoted. See *Wyatt v. Harrison*, 3 Barn. & Ad. 876; *Hunt v. Peake*, 29 Law J., Ch. 787; *North Eastern Ry. Co. v. Elliot*, 2 De G., F. & J. 423; s. c. 10 H. L. Cas. 333; *Harris v. Ryding*, 5 Mees. & W. 60; *Caledonian Ry. Co. v. Sprot*, 2 McQueen, 449; *Bonomi v. Backhouse*, El., B. & E. 646; s. c. 9 H. L. Cas. 503. See also Washburn, *Easements*, 542-544 (3d ed.).

Bonomi v. Backhouse, just cited, is a case of leading importance upon this subject of lateral support. The facts in brief were, that A. was the owner of certain houses standing on land which was surrounded by the lands of B., C., and D. E. was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner, without actual negligence, that the lands of B., C., and D. sank in; and, after an interval of upwards of six years, their sinking occasioned injury to the houses of A. A.

having now brought an action to recover damages for this injury, it was held that he was entitled to recover, his right of action having accrued only when the injury to his own property actually occurred. The decision of the Exchequer Chamber, reversing the judgment of the Queen's Bench (El., B. & E. 622, 646), was affirmed.

The effect of this important decision is, that the right of action against one's neighbor depends upon actual damage (overruling certain *dicta* in *Nicklin v. Williams*, 10 Ex. 259), and that until this occurs, whether sooner or later, by reason of the excavation, no action can be maintained; and, therefore, the Statute of Limitations begins to run (not from the time of the excavation, but) from the time when the injury was actually sustained.

It has been decided in the Exchequer Chamber of England that the owner of land has no right at common law to the support of subterranean water. *Popplewell v. Hodkinson*, Law R. 4 Ex. 248. And it seems that one who, by draining his own land, withdraws from an adjoining owner, claiming under the same grantor, the support of water theretofore flowing beneath the land of that owner, and thereby causes the surface of the land to subside, is not liable for the injury inflicted, unless the act of draining is absolutely in derogation of the special purpose for which the land was originally granted to the adjoining owner. *Ib.*

The principal case, *Thurston v. Hancock*, shows that a person cannot put a great weight upon his land, so near to the line as to prevent his neighbor from excavating altogether, or excavating where it was safe before to do so.

There are many other cases which

illustrate this doctrine. In *Panton v. Holland*, 19 Johns. 92, the plaintiff, in an action on the case, declared that he was owner of a dwelling-house in the city of New York, and that the defendant had dug up the soil of contiguous ground, close to the messuage, whereby the foundation walls of the plaintiff's house were injured. The defendant pleaded not guilty, and the judge charged the jury that the plaintiff was entitled to recover; the only question being as to the amount of damages. The jury having accordingly returned a verdict for the plaintiff, the same was set aside by the Supreme Court, and a new trial granted; the doctrine of the principal case being approved. But it was said that it would have been otherwise had there been evidence that the excavation had been made maliciously, for the purpose of injuring the plaintiff, or negligently.

Lasala v. Holbrook, 4 Paige, 169, was a similar case in chancery. This was an application to dissolve or modify an injunction by which the defendant in the injunction bill had been restrained from digging in his land so near to the plaintiff's church (which had been erected more than thirty-eight years before, and stood six feet from the line between the parties) as to injure the walls of the church. The injunction was dissolved. The Chancellor said that the complainants' church was not entitled to any special protection against the consequences of the action of the defendant, either by prescription or by grant; and, as the defendant and his workmen were in the exercise of reasonable care and skill in their work, the complainants must adopt such course as would secure their church against the dangers to which it was exposed. It was con-

ceded, however, that the case would have been different had the building been ancient, or had there been a grant from the owner of the adjacent lot, or from one under whom he claimed. *Palmer v. Fleasbees*, 1 Sid. 167; *Cox v. Matthews*, 1 Vent. 237, 239; *Story v. Oden*, 12 Mass. 157; *Brown v. Windsor*, 1 Crompt. & J. 20.

The right to the support of buildings, then, where it exists, is (unlike that of the right to the support of ground in its natural state) in the nature of an easement, and can be acquired only by grant or by prescription. *Bonomi v. Backhouse*, El., B. & E. 646; s. c. 9 H. L. Cas. 603. See Washburn, *Easements*, 547, 548 (3d ed.); Gale, *Easements*, 336 (4th ed.).

But even though a building may have stood upon the plaintiff's ground for the period of prescription, if its walls were improperly constructed, so as to give way for this cause, and not by reason of the defendant's excavation alone, the plaintiff cannot recover. *Richart v. Scott*, 7 Watts, 460; *Dodd v. Holme*, 1 Ad. & E. 493; *Hunt v. Peake*, 29 Law J. Ch. 787. Or, if a new story were added to an ancient house, whereby the pressure was so increased as to cause the sinking, the owner could not recover. See *Murchie v. Black*, 84 Law J. C. P. 337.

The mere fact that there were buildings, recently erected, standing upon the border of the plaintiff's land when it sank, will not prevent a recovery of damages. If the soil sank, not on account of the additional weight, but on account of the operations in the adjoining soil, and would have sunk had there been no buildings upon it, the party sustaining the injury is entitled to a recovery. *Stroyan v. Knowles*, 6 Hurl. & N. 454; *Hunt v. Peake*, 29 Law J.

Ch. 785; Gale, Easements, 337 (4th ed.). So, too, if the operations in the soil were carried on negligently, and without due regard to the safety of the plaintiff's building. See *Peyton v. London*, 9 Barn. & C. 725; *Charles v. Rankin*, 22 Mo. 566, 574; *Shrieve v. Stokes*, 8 B. Mon. 458, 459; *Dodd v. Holme*, 1 Ad. & E. 493. But, in the absence of evidence of negligence, if the damage to the plaintiff's soil would have been slight and inappreciable had there been no superincumbent weight upon it, he cannot recover. *Smith v. Thackerah*, Law R. 1 C. P. 564.

Support of Contiguous Houses. — In the Roman law it was declared that the owner of a house which supported other buildings by columns or walls ought to for ever preserve this support. Dig. lib. 8, tit. 2, § 33; Ib. tit. 5, § 2. A learned French writer, referring to this rule of the Roman law, says: C'est l'obligation imposée à un propriétaire voisin d'entretenir perpétuellement en bon état, soit un mur, soit des colonnes, poteaux, piliers, ou quelque autre construction destinée à supporter le poids de l'édifice voisin. 2 Fournel, *Du Voisinage*, § 248. This kind of servitude, the same writer proceeds to say, differs from other servitudes in requiring an active duty on the part of the servient owner (the duty of actively preserving the support). Some of the Roman juriconsults, he tells us, among them Gallus, refused to admit *cette stipulation* (from which term it appears that the right was one arising from grant) into the number of legitimate servitudes, as being contrary to the purely passive character of those rights; but the compilers of the Digest preferred the views of Servius, Labeo, and Ulpian. Lib. 8, tit. 5, § 2.

This right of support, says Fournel

in the same connection, differs from the right *d'appui*, of fixing beams and joists in the building of a neighbor (1 Fournel, § 31), in two particulars: first, the right of support requires of the servient owner an active duty, while the right *d'appui* imposes a passive duty only. The latter servitude requires a man to receive into a wall the beams and joists of his neighbor; but, if the wall happens to fall, the owner need not rebuild it. The destruction of the wall is the destruction of the servitude. But, in the other case, he must rebuild. The second difference results from the fact that the servitude *d'appui* does not require any outlay of money by the servient owner; he is entitled to indemnity for all his expenses. But, in the case of support, the servient owner is bound to make all outlays which may be necessary in order to give his neighbor the enjoyment of his right.

The servitude *d'appui*, like that of support, is acquired by stipulation; it does not exist of common right. 1 Fournel, § 31.

This subject has received some discussion in the English law. In *Peyton v. London*, 9 Barn. & C. 736, Lord Tenterden intimated that if it appeared that the adjoining houses were originally built by the same owner, the right to support might exist. And, in *Richards v. Rose*, 9 Ex. 218, the court unanimously held that where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support; so that the owner who sells one of the houses, as against himself grants such right, and, on his own part, also reserves the right. And consequently the same mu-

tual dependence of one house upon its neighbors still remains; and this, too, regardless of any priority in time of purchase from the original owner. See also *Webster v. Stevens*, 5 Duer, 553; *Eno v. Del Vecchio*, 4 Duer, 53, where the right is spoken of as prescriptive; but, if the presumption of a grant and a reservation of the right of support, upon a sale by the owner, be correct, as it seems to be, the right, of course, exists at once. See *Partridge v. Gilbert*, 15 N. Y. 601.

In *Solomon v. Vintners' Co.*, 4 Hurl. & N. 585, the plaintiff's house had fallen by reason of the tearing down of the defendants', both of which stood in a block of houses. There was, however, an intervening building between these houses. The block had for more than thirty years stood out of perpendicular, leaning towards the west, at which end had been the defendants' building. There was no evidence when the houses were built, or that there had been any connection between them either in title, possession, or occupation. The plaintiff contended that he had acquired a right to the support of the defendants' house, and that he was entitled to recover, however careful the work of removal may have been done. But the court held otherwise. The Chief Baron, speaking for the majority (Bramwell, B., concurred in the result), said that the right of support of buildings was certainly not a natural right, as was the right to the lateral support of ground. "It seems to us," said he, "that in the absence of all evidence as to origin or grant, the only way in which such a right can be supported is that suggested by Lord Campbell in *Humphries v. Brogden* [the principal case, *supra*], namely, an absolute right of law, similar to that which is stated

to have existed in the civil law. But there is no authority for any such rule to be found; at least none was stated to us. Lord Campbell compares it to a right to light. But that right is created by the 3d section of the statute before referred to [the prescriptive Act, 2 & 3 Wm. 4, ch. 71]. And it seems contrary to justice and reason that a man, by building a weak house adjoining to the house of his neighbor, can, if the weak house gets out of the perpendicular and leans upon the adjoining house, thereby compel his neighbor, either to pull down his own house within twenty years, or to bring some action at law, the precise nature of which is not very clear; otherwise, it is said, an adverse right should be acquired against him." But the learned Chief Baron observed that it was not necessary to decide that question since the defendants' house did not adjoin that of the plaintiff. And there was no authority which would hold the defendants liable in such a case as the present. Mr. Baron Bramwell thought that the right of support had been acquired by prescription, and that there was no absolute right, because either of these rights, in order to exist, must be enjoyed visibly and openly; and no one could certainly say, from the appearance of the buildings, that the defendants' house supported the plaintiff's. It was impossible to say which was supported.

Whether the duty laid down in the French and Roman law, to keep the adjoining houses in such repair as to enable them to render the necessary support to each other, prevails in our law is not clear. It is said in *Chauntler v. Robinson*, 4 Ex. 163, 170, that "there is no obligation towards a neighbor cast by law upon the owner of a house, merely as such, to keep it re-

paired in a lasting and substantial manner. *The only duty is to keep it in such a state that his neighbor may not be injured by its fall*; the house may therefore be in a ruinous state provided it be shored sufficiently, or the house may be demolished altogether."

Party Walls.—The right to fix a beam or timber into the wall of a neighbor's house, which prevailed in the Roman law (Dig. lib. 8, tit. 2, 2), depends with us upon the nature of the wall. If it stand wholly upon the land of the owner, it is clear that no such right can exist except by grant or prescription. Any attempt by the adjoining proprietor to fix a timber into the wall would be a trespass for which an action would lie; and probably it could be regarded by the owner of the wall as a nuisance which he could himself abate. And such a wall (the adjoining owner having acquired no rights in it) may be altered or removed at pleasure, provided no injury is done to the adjoining premises.

If, however, the wall be a party wall owned in severalty to the centre (*mur mitoyen*) or in common by both adjoining owners (*mur commun*), the case will be different, and each will be entitled to fix timbers into it.

The rule in such case is doubtless the same as that laid down in the French law, to wit, that each of the co-owners has the right to make use of the wall for all purposes for which it was designed, in a prudent manner, without damage to the wall or prejudice to the other owner. 8 Toullier, liv. 2, ch. 3, § 199 (p. 138, 5th ed.).

In the case of a wall *mitoyen*, the French Code allows either of the common owners to build upon the wall, and to place upon it beams and joists not only to the centre of the wall but

through the whole thickness of it, upon the payment of a certain sum. *Ib.* This, however, was in derogation of the *Coutume de Paris*, which did not permit either to extend the timbers beyond the centre of the wall. But (under the Code) if the other owner wishes to put timbers into the same place he has the right to cut off the ends of his neighbors' timbers at the middle of the wall. *Ib.*

Under our law it would seem that where the wall is *mitoyen* (that is, owned in severalty to the centre), neither owner could put his timbers beyond the middle of the wall. To pass the line of division without permission would doubtless be as much a trespass as to step foot upon the soil without permission; and the reason, or at least one reason, why the law will not allow this is, that the trespasser, if the act were permitted, might acquire an easement against his neighbor.

If, however, the wall be owned in common, the rule would perhaps be otherwise. See *Stedman v. Smith*, 8 El. & B. 1, showing that such a wall may be taken down by either owner, for the purpose of rebuilding, if necessary. See also *Roberts v. Bye*, 30 Penn. St. 375; *Eno v. Del Vecchio*, 6 Duer, 17, 26; s. c. 4 Duer, 58; *Partridge v. Gilbert*, 15 N. Y. 601; *Potter v. White*, 6 Bosw. 647.

In *Eno v. Del Vecchio*, just cited, it was decided that if either of the co-owners of a party wall wishes to improve his own premises before the wall has become ruinous, or incapable of further answering the purposes for which it was erected, he may underpin the foundation, sink it deeper, and increase, within the limits of his own lot, the thickness, length, or height of the wall, if he can do so without injury to the building upon the adjoining lot;

and, to avoid such injury, he may shore up and support the original wall for a reasonable time, in order to excavate and place a new underpinning beneath it. But he cannot interfere with it in any manner unless he can do so without injury to the adjoining building, unless he has the consent of the adjoining owner.

In either case if a party-wall rest upon an arch the legs of which stand within the land of the respective owners, neither can remove one of the legs to the detriment of his neighbor. *Partridge v. Gilbert*, 15 N. Y. 601; *Dowling v. Hemmings*, 20 Md. 179.

And upon general principles relating to property held in common, neither party could tear down the wall without the consent of the other, except for necessary repairs and rebuilding, though the wall was owned in common and not in severalty. See note on *Trespass upon Property*, *ante*, p. 358.

Again, either owner may, by the French law, run up the party wall, at his own expense, and at his own cost of repair, above the former height, and also paying a price to be fixed by experts for the increased charge upon the wall. 3 Toullier, liv. 2, c. 3, § 200.

By the law of England and of this country, either owner may run up the wall to any height, provided no damage is thereby done to the other. *Matts v. Hawkins*, 5 Taunt. 20; *Cubitt v. Porter*, 8 Barn. & C. 257; *Brooks v. Curtis*, 50 N. Y. 639, 644. But, if damage be done, however carefully the work may be carried on, it seems that the party will be liable if he has acted without the consent of his neighbor.

Subjacent Support.—It is settled law that there may be two freeholds in the same body of earth measured superficially and perpendicularly down

towards the centre of the earth—to which *prima facie* the unlimited ownership of the soil extends; to wit, a freehold in the surface soil and enough of that lying beneath it to support it, and a freehold in underlying strata, with a right of access to the same, to work therein and remove the contents. *Washburn, Easements*, 588 (3d ed.); *Wilkinson v. Proud*, 11 Mees. & W. 33; *Rowbotham v. Wilson*, 8 El. & B. 123, 142; *New Jersey Zinc Co.*, 2 Beas. 302–341.

But this right to the subjacent strata is not unqualified; on the contrary, it must be exercised in such a way (as was decided in the principal case, *Humphries v. Brogden*), as not to impair the support of the surface freehold. And it matters not that the underground work was conducted carefully, and in the usual manner.

In *Richards v. Jenkins*, 18 Law T. N. S. 437, it was decided that there is a difference between rights of support against a subjacent owner of land and an adjacent owner (that is, between underlying and lateral support), in respect of erections upon the dominant tenement. The right to the support of buildings, as we have seen, depends, generally speaking, upon the question whether they are ancient or not; but, as against the underlying freehold, the owner of the overlying tenement is entitled to the support of all buildings which were erected (however recently) before the title of the lower owner began and possession was taken.

Whether the upper owner is entitled to support for buildings subsequently erected was not decided; but it was the opinion of Channel, B., that he would not be, until after twenty years' user. See also, upon the subject of support of buildings, *Harris v. Ryding*,

5 Mees. & W. 60; *Smart v. Morton*, 6 El. & B. 30, 46; *Rowbotham v. Wilson*, ib. 593; s. c. 8 H. L. Cas. 245; *Haines v. Roberts*, 7 El. & B. 625; *Rogers v. Taylor*, 2 Hurl. & N. 828; *Partridge v. Scott*, 3 Mees. & W. 220; *Strayan v. Knowles*, 6 H. & N. 465; *Brown v. Robins*, 4 Hurl. & N. 186; *Northeastern Ry. Co. v. Elliot*, 1 Johns. & H. 145; s. c. 10 H. L. Cas. 333; *Bonomi v. Backhouse*, El., B. & E. 646; 9 H. L. Cas. 503, deciding that the right of subjacent as well as lateral support is a right of property and not an easement, and therefore that the Statute of Limitations begins to run from the time of the damage to the plaintiff, and not necessarily from the time of the wrongful act of the defendant.

The right of support of upper tenements of houses owned by different persons is analogous. This subject, however, does not appear to have much engaged the attention of our courts. The principles, indeed, seem simple. It is but reasonable that the occupant of the lower tenement should be required to abstain from all acts which would impair the supports of his neighbor overhead. *Graves v. Berdan*, 26 N. Y. 501. This rule would not prevent him from making necessary repairs; but, in doing this, it would doubtless be held necessary for him to keep a sufficient underpinning below the upper tenement to prevent the walls from sinking or cracking. Under what circumstances he would be justified in putting his neighbor above to the annoyance of repairs; or whether he would be compelled to make improvements in order to prevent the upper tenement from sinking, — *quare*? And *quare*, also, whether he would be justified in making unnecessary im-

provements to the annoyance of the occupant above? See *Keilwey*, 98 b, pl. 4; *Anonymous*, 11 Mod. 7; *Loring v. Bacon*, 4 Mass. 575; *Stevens v. Thompson*, 17 N. H. 109; *Calvert v. Aldrich*, 99 Mass. 74; *Cheeseborough v. Green*, 10 Conn. 318; *Ottumwa Lodge v. Lewis*, 34 Iowa, 67; *Washburn, Easements*, 597-599 (3d ed.), where the effect of these cases is stated. Most of them, however, are cases of contribution between co-owners, which subject we do not consider.

The French law throws some light upon this subject. The Code Napoleon, Art. 664, provides for the *adjustment* of repairs; declaring that when the different stories of a house belong to different proprietors, if the titles to the property do not regulate the mode of repairs and reconstructions, they must be made in this way: The main walls and the roof are at the charge of all the proprietors, each in proportion to the value of the story belonging to him. The proprietor of each story makes the floor belonging thereto. The proprietor of the first story erects the staircase which conducts to it; the proprietor of the second story carries the stairs from where the former ends to his apartments; and so of the rest. Code Nap. London ed. 1824, transl.

M. Merlin, in his *Répertoire de Jurisprudence*, tit. *Batiment*, says that when a building is in the possession of two owners, one owning the lower story and the other the upper, either can do any thing which he pleases in the portion which he possesses, provided always that he does no prejudice to the other, in respect either of convenience or of support. For instance, says this distinguished author, the one who occupies the lower tenement cannot make a forge there, for that would discommode

the upper owner; and this had been so adjudged. Likewise, he continues, the lower owner cannot change the situation of the funnels of the chimneys, or make new ones where there were none before; and so of other changes or innovations (*nouveautés*) which would affect the upper tenement.

In the custom of Auxerre, art. 216, referred to in the same connection, it is provided that if the lower story of a house belongs to one man and the upper to another, the owner of the lower story is bound to *construct and maintain* all the walls of the house up to the story which belongs to the other proprietor, and to furnish the beams, joists, and ceilings of the floor above the part which belongs to him. And the customs of several other cities named are the same. Thus, says M. Merlin, according to these customs, each proprietor maintains only the walls of the stories which belong to him; and the owners of the upper stories do not

contribute to the lower part of the walls, though this serves them for fixing timbers (*d'appui*) and for support. See also 3 Toullier, 152; 5 Duranton, 384.

Easements of Light.—It only remains to remark that the English doctrine of easements of light, natural or prescriptive, referred to in *Thurston v. Hancock*, does not prevail in this country. *Parker v. Fouts*, 19 Wend. 309; *Pierre v. Fernald*, 26 Maine, 436; *Napier v. Bulwinkle*, 5 Rich. 311; *Cherry v. Stein*, 11 Md. 1; *Haverstick v. Sipe*, 33 Penn. St. 368; *Hubbard v. Town*, 33 Vt. 295; *Ward v. Neal*, 37 Ala. 500; *Mullen v. Stricker*, 19 Ohio St. 135, 142; *Ingraham v. Hutchinson*, 2 Conn. 584; *Keats v. Hugo*, 115 Mass. 204, overruling *Story v. Odin*, 12 Mass. 167, and the *dictum* of the principal case, and similar ones in *Grant v. Chase*, 17 Mass. 443, and in *United States v. Appleton*, 1 Sum. 492.

NEGLIGENCE.

MCCULLY v. CLARK, leading case.

DIXON v. BELL, leading case.

HAMMACK v. WHITE, leading case.

BYRNE v. BOADLE, leading case.

Note on Negligence generally.

Historical aspects of the subject.

Negligence as a question of law or of fact.

Presumptions of negligence.

THOMAS v. WINCHESTER, leading case.

Note. To whom Wrong-doer liable.

Causation.

Breaches of contract.

FISHER v. THIRKELL, leading case.

HILLIARD v. RICHARDSON, leading case.

Note. Who liable.

Landlord and tenant.

Contractors.

Sub-contractors.

Servants employing others.

Servants under double masters.

Builders and architects.

INDERMAUR v. DAMES, leading case.

ROBERTS v. SMITH, leading case.

FARWELL v. BOSTON W. & R. CORP., leading case.

Note on Care of Premises.

Persons (not servants) injured while on defendant's premises.

Servants injured on master's premises.

Servants injured from negligence of fellow-servants.

SUTTON v. WAUWATOSA, leading case.

Note on Contributory Negligence.

Ground of doctrine.

Burden of proof.

Identification or imputability.

Passenger and carrier.

Parent and child.

MCCULLY v. CLARK and THAW.

(40 Penn. St. 399. Supreme Court, Pittsburgh, 1861.)

Negligence as a Question of Law or Fact. In an action on the case for damages against defendants, for negligence in not caring for and extinguishing a pile of coal which had taken fire, whereby the warehouse of the plaintiff adjoining, with its contents, was burned up and destroyed, the proper subject of inquiry is, whether the de-

defendants had used such care, caution, and diligence as prudent and reasonable men would have exercised; and it is a question for the jury. Hence, it was not error in the court below to refuse to instruct the jury, that if they believed certain facts to be proved, of which evidence had been given, the defendants were guilty of negligence as a matter of law, and that the plaintiff was entitled to recover.

In actions for negligence, the burden of proof is on the plaintiff. The court below sustained in declining to rule that the proof of certain designated facts by the plaintiff was sufficient to change the burden.

This was an action on the case brought in the District Court to July term, 1859, by James McCully against Thomas S. Clark and William Thaw, partners, doing business as Clark & Thaw, to recover damages for the destruction by fire of a warehouse and contents, owned by him, on Penn Street, in the city of Pittsburgh, alleged to have been occasioned by the default of the defendants in "negligently and wilfully" permitting a large quantity of burning coal to remain for a long time unextinguished upon their premises, immediately adjoining the wall of the warehouse which was destroyed. The testimony was to the effect that plaintiff's property, of the value of \$30,000, was consumed by fire on the morning of July 20, 1858; that the premises had been closed up as usual on the previous evening, no person remaining therein, and no fire being kept thereupon; that on the 26th day of the previous month the warehouse immediately adjoining thereto, and occupied by the defendants, who were transporters upon the Pennsylvania Canal, was burned to the ground by a fire originating in and communicated by a boat belonging to the said defendants; that the said last-mentioned warehouse, being of the height of a single story, and without any cellar underneath the same, was used by the defendants for the deposit of coal, belonging to themselves, and stored for the purpose of transportation therein; that, at the time of the said fire, a large quantity of the coal, amounting to several thousand bushels, was piled up to the depth of some five or six feet against the wall next adjoining to the warehouse of the plaintiff; that the said coal was ignited at the time of the destruction of the defendant's warehouse, and continued to burn until the 20th of July next following thereafter; that the said plaintiff, apprehending danger therefrom, complained on several occasions to the mayor of said city, and that, notwithstanding occasional intermitted efforts on the part of the defendants to extinguish the same by throwing water

thereon, the coal continued to burn until the period of the destruction of the plaintiff's property.

The plaintiff further offered evidence to show that his warehouse was strongly and substantially built, with cellar and other independent walls throughout; and that the fire had its commencement in the ends of the timbers inserted in that part of the defendant's wall, against which the said mass of burning coal was piled. He also offered evidence to prove that the application of water, as shown by the testimony, would be only to intensify the heat; that the only feasible means of extinguishing it would have been by taking the same away, and that a large portion of the coal was converted by the operation into coke, and in that shape afterward disposed of and removed by the defendants.

The defence was, that the fire did not originate from the burning of the coal in the ruins of defendant's warehouse; that the defendants were guilty of no negligence in relation to the coal burning in the ruins of their warehouse, but had employed frequent, efficient, and faithful means to extinguish the fire down to the evening immediately preceding the burning of plaintiff's warehouse, at which time it was apparently extinguished, no fire being afterwards seen by any one in the ruins of defendant's warehouse; and that if there was in fact, or if the plaintiff supposed there was, the slightest danger of injury to his own property from the cause assigned, *he* was guilty of the grossest negligence in neglecting all efforts to prevent the injury, and in not giving notice to defendants, he having been frequently at the ruins while the fire was burning, and in that he had no fear of it.

Under the above facts the plaintiff requested the court to charge the jury:—

1. That if the jury believe that the defendants had a large pile of coal placed in their warehouse against the side walls thereof, for a distance of from sixty to ninety feet or thereabouts, and in height against said walls from five to nine feet or thereabouts, and extending out from said walls from eight to twelve feet or thereabouts, at the same or a greater height; and thence extending some eight or ten feet further, diminishing from said height to almost nothing; and that the stone wall of plaintiff's warehouse was built close up against the stone wall of defendant's warehouse, against which said coal was piled; and the brick wall of plaintiff's warehouse ran close alongside of the brick wall of de-

defendants' warehouse, against which said coal was piled ; and if the jury believe that said coal was set on fire by the burning of defendants' warehouse, on June 26, 1853, and continued to burn until July 20, 1853, the defendants being aware of the fact, still in possession, and having caused water to be thrown upon the same at different intervals during said period, without extinguishing the same ; and if the jury further believe that fire was communicated to plaintiff's warehouse and its contents from the fire in said coal pile, and that the same were thereby burned up on July 20, 1853 ; then, from these facts, as a matter of law, the defendants are guilty of negligence, and the plaintiff is entitled to recover the value of his warehouse and its contents.

2. That if the jury find the facts as stated in the foregoing point, and the court should decline to charge that, as a matter of law, the plaintiff is entitled to recover, then the court is requested to charge that these facts throw upon defendants the burden of proof in the case ; and the jury must be satisfied that said fire in said coal pile could not have been extinguished by the defendants from June 26 to July 20 ; otherwise the plaintiff is entitled to a verdict for the value of his warehouse and its contents.

3. That there is no evidence in the cause of any such negligence on part of plaintiff as will prevent his recovering.

4. That the defendants permitting a large mass of coal, piled against the walls of their warehouse, immediately adjacent to the walls of plaintiff's warehouse, to be on fire for some twenty-four days in the most busy part of the city of Pittsburgh, they knowing the fact, was a violation of their duties as citizens ; a nuisance and gross negligence towards the plaintiff and his property ; and if plaintiff's property was set on fire thereby or therefrom, defendants are liable for the loss, and there is no evidence in this case by which they are entitled to escape from such liability.

5. That plaintiff had no right to go on the private property of defendants to extinguish this fire ; but if the court should think he had, by reason of the fire being a public nuisance, still he was not bound to do so, and his failure so to do was not such negligence on his part as will prevent his recovering.

6. That the leaving of a large pile of burning coal belonging to the defendants, upon their own premises, in immediate proximity to the plaintiff's warehouse, in the centre of a populous city, is

negligence *per se*; and if the plaintiff's house was set on fire thereby, the defendants are liable to the extent of the loss thereby occasioned.

7. That it was the duty of the defendants to extinguish the said fire, and, if not otherwise practicable, to remove the coal itself for that purpose; and that the law casts no duty on the plaintiff to undertake the labor and incur the expense of doing this himself.

8. That if the law did make it the duty of the plaintiff to take any steps himself, that duty was discharged by an application to the mayor, and such application will relieve him from the imputation of negligence. The court below (Williams, J.), after reciting the main facts of the case, charged the jury as follows:—

“The plaintiff's right to maintain this action, and to recover damages for the destruction of his warehouse and its contents by fire, and the defendants' liability therefor, depend upon well settled principles of law, easily understood and readily applied.

“1. The plaintiff is not entitled to maintain this action, and to recover damages for his loss, unless the fire which destroyed his warehouse was occasioned by the negligence of the defendants. Negligence is the very gist of this action; and, therefore, unless the defendants' negligence was the occasion of the fire, the plaintiff is not entitled to recover.

“2. The plaintiff was bound to use ordinary and reasonable care and diligence for the preservation of his property, and he is not entitled to recover if his own negligence contributed to, or was the cause of, its destruction. If the fire which caused the loss of the warehouse and its contents was occasioned by the mutual negligence of both the plaintiff and defendants, the former is not entitled to recover damages for the loss which he has sustained. Negligence is the want of proper care, caution, and diligence,—such care, caution, and diligence as, under the circumstances, a man of ordinary and reasonable prudence would exercise. It consists in nonfeasance; that is, omitting to do or not doing something which ought to be done, which a reasonable and prudent man would do; and a misfeasance, that is, the doing something which ought not to be done, something which a reasonable man would not do, or doing it in such a manner as a man of ordi-

nary and reasonable prudence would not do it ; in either case causing, unintentionally, mischief or injury to a third party.

“ The jury will then determine from the evidence : —

“ 1. What was the cause of the burning of plaintiff’s warehouse ? Was it set on fire by the burning of the coal in the ruins of the warehouse in the possession and occupancy of the defendants ? Was the wall of McCully’s warehouse so heated by the burning of the coal in the ruins of the warehouse of Clark & Shaw, that it set the girders in the wall on fire, and thus communicated the fire to the whole building ?

“ 2. If so, were the defendants guilty of negligence in allowing the coal pile, in the ruins of their warehouse, to burn in the way and for the length of time it did ? If the defendants were guilty of negligence, it was because they did not extinguish the fire, owing to the fact that either they did not use the proper means, or did not employ them with sufficient vigor, energy, and perseverance.

“ 3. Was the plaintiff without fault, or was he guilty of negligence ; and was his negligence the cause or occasion of the fire, or did it contribute thereto ? Would his warehouse have been burned if he had exercised ordinary and reasonable diligence ? ” The court called the attention of the jury to the facts and circumstances in evidence, relied on by the counsel on both sides as tending to show the origin and cause of the fire ; and also as tending to show whether their respective clients had or had not been guilty of negligence, and then proceeded in substance as follows : —

“ The jury will determine for themselves what was the origin of the fire ; whether or not it was set on fire by the burning coal in the ruins of the defendants’ warehouse ; and unless satisfied that it was, they will find for the defendants. But if the jury find that plaintiff’s warehouse was set on fire by the pile of burning coal in the ruins of defendants’ warehouse, and that the defendants did not use ordinary care and skill and the proper means to extinguish it, and that they were guilty of negligence in this respect ; and that in consequence thereof plaintiff’s warehouse was set on fire, then the jury will find for the plaintiff damages for the full amount of his loss, unless they find that his own want of reasonable care contributed to or was the occasion of his loss. The plaintiff is not entitled to recover if the loss would not have occurred except for his own negligence.

"The counsel on both sides have submitted a number of points upon which they have prayed the instruction of the court, but so far as they are not answered in the charge they are refused. The court declines to charge, *as matter of law*, either that there was or was not negligence on the part of either the plaintiff or defendants. Whether either or both the parties were or were not guilty of negligence, are questions of fact for the determination of the jury, from all the evidence in the case."

Under these instructions there was a verdict and judgment in favor of defendants. The case was then removed into this court by the plaintiff, who assigned for error the refusal of the court below to affirm the points submitted, and to charge, *as matter of law*, either that there was or was not negligence on the part either of the plaintiff or defendants, and the referring the same, as a question of fact for the jury, without any evidence of negligence on the part of the plaintiff.

R. Woods, for plaintiff. *A. W. Loomis* and *C. B. Smith*, for defendants.

The opinion of the court was delivered, November 11, 1861, by STRONG, J. No complaint is made of the instruction given to the jury in this case. None could be, with any shadow of reason. The charge was a clear, accurate, and comprehensive statement of the principles of law applicable to the facts of which evidence had been given. It is not alleged that it contained any thing erroneous. The complaint here is, that the learned judge did not say more; that he did not take the facts away from the jury, and instruct as matter of law that the plaintiff was entitled to recover.

The action was brought for negligence. The point of the accusation was, that the defendants had so negligently kept and continued a certain pile of coal which had taken fire, and so wrongfully and negligently failed to extinguish the fire, that the warehouse of the plaintiff, with its contents, had been ignited and destroyed. Whether the defendants had been guilty of the negligence charged, was, therefore, the principal subject of inquiry; in other words, whether they had exercised such care and diligence to prevent injury to the property of the plaintiff, as a prudent and reasonable man, under the circumstances, would exercise. Now, it is plain that what is such a measure of care is a question peculiarly for a jury. A higher degree is doubtless

demanding under some circumstances than under others. It varies with the danger. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and must be submitted to the jury. There are, it is true, some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Such was this case. The question was not alone what the defendants had done, or left undone; but, in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve. When, therefore, the court was asked to instruct the jury, that if they believed certain facts were proved, of which evidence had been given, the defendants were guilty of negligence, and the plaintiff was entitled to recover, the instruction was properly refused. It could not have been given without determining, as matter of law, what care and caution a prudent and reasonable man would have exercised in circumstances similar to those in which the defendants were placed. The points proposed to the court assumed that the defendants were under obligation completely to extinguish the fire in the coal pile within a designated time. They did not propose to submit to the jury even so much as whether it could have been done, much less whether every reasonable effort had not been made to extinguish it. Nor were the facts which the court was called upon to declare conclusive proof of negligence, and entitling the plaintiff to recover, all the material facts of which there was evidence in the case. There were others of a qualifying nature, important to the inquiry, whether the defendants had been culpably negligent. Without considering these other facts, the court must have taken but a one-sided view of the case. Besides all this, the court could not have directed a verdict for the plaintiff, as requested, without deciding that there was no evidence at all of concurring negligence on the part of the plaintiff. But even

if the loss of the plaintiff was occasioned by want of due caution on the part of the defendants, the case was not destitute of evidence that the plaintiff's negligence contributed to the loss.

For similar reasons, the court was right in declining to charge the jury that certain facts enumerated, even though not constituting negligence in law, threw upon the defendants the burden of proof in the case, and that the jury must be satisfied that the fire could not have been extinguished within a designated time, or the plaintiff would be entitled to a verdict. The instruction asked for assumed that it was for the court to determine precisely what was due diligence and caution, and to rule that nothing less than the complete extinguishment of the fire in the specified time, if possible, would bring their conduct up to the standard by which prudent and reasonable men are guided. This point, also, as did the others, ignored pertinent and important facts in evidence, which must have been considered in determining whether there was negligence at all; and, if affirmed, it might have given the plaintiff a verdict, even though the plaintiff's own negligence may have concurred in causing his loss. In actions for negligence the burden of proof is upon the plaintiff. The law will not presume it for him. And in cases like this, where all the evidence must be considered in order to ascertain whether negligence existed, it is a mistake to suppose that a court may be required to single out some of the facts proved and declared, that they remove the burden of proof from the shoulders of the plaintiff, and cast it on the defendant. That can only be done where a court can determine what constitutes guilt. It is the province of the jury to balance the probabilities, and determine where the preponderance lies. The case relied upon by the plaintiff in error, *Piggot v. The Eastern Counties Railway Company*, 3 Com. B. 229, 54 Eng. C. L. Rep. 228, is in perfect harmony with these doctrines. In that case the defendants ran a locomotive, the sparks from which set fire to the property of the plaintiff. Using a dangerous agent, the law required of them to adopt such precautions as might reasonably prevent damage to the property of others. Some precaution was a duty. They had no right to run their locomotive without it. Failure to adopt some precaution was, therefore, failure to discharge a defined duty, and was negligence. In such a case the court might well say, as was said, that a fire caused by running the engine, without any evidence of precaution, estab-

lished a *prima facie* case of negligence. Even this, however, was not laid down as a matter of law to the jury. It was only said by one of the judges, in commenting on the evidence, and in reply to a rule for a new trial, on the ground that the verdict was against the weight of the evidence. It was, therefore, no more than an assertion that the jury might have drawn the inference of negligence from the facts that a locomotive had kindled a fire, and that there had been no precaution. That was a very different case from the present. Even if the court might in that case have declared the effect of the evidence, it must have been because the duty of the defendants was unvarying and well defined by the law. Here the standard of duty was to be found as a fact, as well as the measure of its performance, and there was evidence of earnest, continued, and apparently successful efforts to extinguish the fire in the coal. This disposes of all the assigned errors, except the fifth and eighth. Of them we need only say that they were not insisted on in the argument, and we have not been able to discover that they point to any error committed.

Judgment affirmed.

DIXON v. BELL.

(5 Maule & S. 198. King's Bench, England, Trinity Term, 1816.)

Instruments of Danger. — The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care; therefore, where defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him, and drawing the trigger, when the gun went off; *held*, that the defendant was liable to damages in an action upon the case.

CASE. The plaintiff declares that the defendant was possessed of a gun, then being in a certain messuage, situate, &c.; and that he, well knowing the same to be loaded with powder and printing types, wrongfully and injuriously sent a female servant to the said messuage, to fetch away the gun so loaded, he well knowing that the said servant was too young, and an unfit and improper person to be sent for the gun, and to be intrusted with the care or custody of it; and which said servant afterwards, and while

she was so sent and intrusted by the defendant, and had the custody of the said gun accordingly, carelessly and improperly shot off the same, at and into the face of the plaintiff's son and servant, and struck out his right eye and two of his teeth, whereby he became sick, &c., and was prevented from performing his lawful business, and the plaintiff was deprived of his service, and put to great expense in procuring his cure, &c. There was a second count, for taking such improper care of the gun, knowing that it was loaded, that the gun was afterwards discharged against the plaintiff's son, &c. Plea, not guilty. At the trial, before Lord *Ellenborough*, C. J., at the last Middlesex sittings, the case was thus: The plaintiff and defendant both lodged at the house of one Leman, where the defendant kept a gun loaded with types, in consequence of several robberies having been committed in the neighborhood. The defendant left the house on the 10th of October, and sent a mulatto girl, his servant, of the age of about thirteen or fourteen, for the gun, desiring Leman to give it her, and to take the priming out. Leman accordingly took out the priming, told the girl so, and delivered the gun to her. She put it down in the kitchen, resting on the butt, and soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a child between eight and nine, saying she would shoot him, and drew the trigger. The gun went off, and the consequences stated in the declaration ensued. There was a verdict for the plaintiff, damages £100. The *Attorney-General* moved for a new trial, on the ground that the defendant had used every precaution which he could be expected to use on such an occasion; and, therefore, was not chargeable with any culpable negligence.

LORD ELLENBOROUGH, C. J. The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved, that the order to Leman was not sufficient, consequently, as, by this want of care, the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable.

BAYLEY, J. The gun ought to have been so left as to be out of all reach of doing harm. The mere removal of the priming left the chance of some grains of powder escaping through the touchhole.

Per curiam.

Rule refused.

HAMMACK, *Administratrix*, v. WHITE.

(11 Com. B. N. S. 588. Common Pleas, England, Hilary Term, 1862.)

Trying Horse in a Thoroughfare.— The defendant bought a horse at Tattersal's, and the next day took him out to "try" him in Finsbury Circus, a much-frequented thoroughfare. From some unexplained cause the horse became restive, and, notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement and killed a man. *Held*, that these facts disclosed no evidence of negligence which the judge was warranted in submitting to the jury.

THIS was an action upon Lord Campbell's Act, 9 & 10 Vict. c. 93, by Mrs. Hammack, the widow and administratrix of William Hammack, to recover damages against the defendant for having, by his negligence, caused the death of the intestate.

The declaration alleged that the deceased, in his lifetime, was lawfully passing in and along a certain common public highway, and that the defendant so carelessly, negligently, and improperly rode a certain vicious horse in the said highway, that, by and through the carelessness, negligence, and improper conduct of the defendant in that behalf, the said horse ran with great force and violence upon and against the deceased, and cast and threw him down, and so injured him that the deceased, within twelve months next before the action, died.

The defendant pleaded not guilty; whereupon issue was joined.

The cause was tried before the recorder of London in the Lord Mayor's Court, when the following facts appeared in evidence:—

On the 7th of May, 1861, the deceased was walking on the foot-pavement in Finsbury Circus, when he was knocked down and kicked by a horse on which the defendant was riding. He was picked up and carried to St. Bartholomew's Hospital, where he died on the 16th, in consequence of the injuries he had sustained.

It appeared that the defendant had bought the horse the day before at Tattersal's, and had taken it out to "try" it, when the horse became unmanageable and swerved from the roadway on to the pavement, notwithstanding the defendant's efforts to restrain him. It did not appear that the defendant had omitted to do any thing he could have done to prevent the accident; but it was insisted on the part of the plaintiff that the mere fact of the defendant's having ridden, in such a place, a horse with whose temper he was wholly unacquainted, was evidence of negligence. Some reliance was also placed upon the fact of there being certain police notices affixed at various parts of the circus, cautioning all persons not to exercise horses there.

The learned recorder being of opinion that there was nothing in the evidence to warrant a jury in finding that the defendant had been guilty of negligence, directed a nonsuit.

Patchett, in Michaelmas Term last, obtained a rule *nisi* for a new trial, on the ground of misdirection. He referred to *Weaver v. Ward*, 2 Rol. Abr. 548, Hob. 134, Moor, 864; *Michael v. Alestree*, 2 Lev. 172, 1 Ventr. 295, 3 Keble, 650; and *Leame v. Bray*, 3 East, 593.

H. James now showed cause. If a man intentionally commits an unlawful act, he is responsible for all the consequences which may reasonably be expected to flow from such an act. So, if he is guilty of negligence in the doing of a lawful act, and the natural and proximate result is injury to a third person, he is liable. See *Scott v. Shepherd*, 2 Sir W. Bl. 892, and the authorities collected in the notes to that case in *Smith's Leading Cases*, 4th ed. 343. In all these cases the intention of the party was to do the act from which the mischief ensued. There was no such intentional acting here. There was nothing to show that the horse was ridden negligently, or that the rider knew him to be vicious or restive. In *Gibbons v. Pepper*, 1 Ld. Raym. 38, 4 Mod. 404, 2 Salk. 637, it seems to have been held that a person who causes the accident by spurring the horse would be liable. [WILLES, J. Incautiously using the spur at an inauspicious moment was recently held in this court to be some evidence of negligence. See *North v. Smith*, 10 Com. B. N. S. 572.] Negligently driving on a dark night on the wrong side of the way, was held in *Leame v. Bray*, 3 East, 593, to render the party liable in trespass, though he were no otherwise blamable. In *Michael v. Alestree*, 2 Lev. 172, 1 Ventr.

295, the defendant was guilty of negligence. So also in *Wakeman v. Robinson*, 1 Bing. 218, 8 J. B. Moore, 63, where the defendant pulled the wrong rein. *Templeman*, app., *Haydon*, resp., 12 Com. B. 507, is the strongest case against the defendant. The marginal note there is scarcely borne out by the facts. The appeal was dismissed on the ground that there was no erroneous decision (by the county court judge) in point of law. The remarks of Maule, J., show that the court considered there was evidence of negligence on the part of the defendant. "Where," he says, "a cart is defective, or a horse is possessed of certain qualities, it may be negligence on the part of the driver if he does not deal with them according to their respective conditions or qualities. If a horse is full of life and spirit, it necessarily demands more care than one which is sluggish and worn out. So a cart that is infirm requires to be driven more steadily than one which has undergone less wear and tear. And it may well be that a failure in respect of either would amount to negligent driving." *May v. Burdett*, 9 Q. B. 101, which is frequently cited, is hardly applicable here: the injury there arose from a monkey, an animal not domesticated. Nor is this like the case of *Christie v. Griggs*, 2 Camp. 79, where the action was founded on the contract of a stage-coach proprietor safely to carry his passengers. It may be urged that the defendant was not lawfully riding under the circumstances in *Finsbury Circus*; and the *Metropolitan Police Act*, 2 & 3 Vict. c. 47, § 54, may be relied on. That section prohibits, amongst other things, the "exercising, training, or breaking of any horse" in any thoroughfare or public place within the limits of the metropolitan police district; but, to bring a person within that section it must be shown that he is merely exercising, training, or breaking the animal, to the annoyance of the inhabitants or passengers, which there is no pretence for saying that this defendant was doing. The true principle which governs these cases is that which was laid down in a recent case in this court, of *Cotton v. Wood*; 8 Com. B. N. s. 568, viz., that the judge will not be justified in leaving the case to the jury, where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.

Patchett, in support of the rule. This case falls precisely within the rule in *Michael v. Alestree*, 2 Lev. 172, 1 Ventr. 295. That was an action on the case "for that the defendants (the master

and his servant) in Lincoln's Inn Fields, a place where people are always going to and fro about their business, brought a coach with two ungovernable horses, et cux improvide, incaute, et absque debita consideratione ineptitudinis loci there drove them, to make them tractable and fit for a coach, and the horses, because of their ferocity, being not to be managed, ran upon the plaintiff, and hurt and grievously wounded him." It was moved in arrest of judgment, "that no *scienter* is here laid of the horses being unruly, nor any negligence alleged, but, *e contra*, that the horses were ungovernable." But judgment was given for the plaintiff, "for 'tis alleged that it was improvide et absque debita consideratione ineptitudinis loci." The real question is, on whom lies the burden of proof. The declaration states that the deceased was lawfully passing in and along a public highway, and that the defendant so carelessly, negligently, and improperly rode a vicious horse there, that, through that carelessness and negligence, the deceased lost his life. The evidence to support that was, that the deceased was walking on the foot-pavement in a populous thoroughfare, when he was knocked down and killed by a horse which the defendant was "trying," having only purchased him the day before at Tattersal's, where it is well known that all horses are sold without warranty. That, it is submitted, was ample *prima facie* evidence of negligence. [WILLIAMS, J. The defendant was carried against the deceased by a horse, which all his apparently well-directed efforts were ineffectual to control.] What more could the plaintiff do than show that the deceased was in a place where he might reasonably conceive himself to be safe, and that the defendant rode where he had no right to be? [ERLE, C. J. The fair result of the plaintiff's evidence was, that the defendant was riding along quietly, when, for reasons not given, the horse became restive.] If the defendant had been called, it might have come out on cross-examination that he incautiously used a whip or a spur. [ERLE, C. J. The question before us, is, whether, on the evidence then before him, the judge was right in point of law in nonsuiting the plaintiff.] Sir James Mansfield, in *Christie v. Griggs*, 2 Camp. 79, says: "I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good

a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were, probably, all sailors, like himself; and, how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it is unfounded; and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a *mere* accident." [WILLIAMS, J. That case went upon the carrier's undertaking that he would provide for the safe conveyance of his passengers, as far as human care and foresight could go.] Still the principle of the ruling is applicable here. In the case of a railway accident, one who sues the company for an injury sustained by him from a collision on the train getting off the rails, makes out a sufficient *prima facie* case when he has proved the collision or the departure from the rails and the amount of injury. *Carpue v. The London and Brighton Railway Company*, 5 Q. B. 747, D. & M. 608, 3 Railw. Cas. 692. [WILLIAMS, J., referred to *Perren v. The Monmouthshire Railway and Canal Company*, 11 C. B. 855.] In *Skinner v. The London, Brighton, and South Coast Railway Company*, 5 Exch. 787, a declaration against a railway company stated that the plaintiff, at the request of the defendants, became a passenger in one of their trains, to be carried, &c., and that, through the carelessness, negligence, and improper conduct of the defendants, the train in which the plaintiff was such passenger struck against another train, whereby the plaintiff was injured. At the trial, it appeared that the accident was occasioned by the train in which the plaintiff was running against a train standing at the station, it being then dark; and it was held, that the mere fact of the accident having occurred, was *prima facie* evidence of negligence on the part of the defendants. Negligence in all these cases is purely for the jury. *Crofts v. Waterhouse*, 3 Bingh. 319, 11 J. B. Moore, 133. The evidence given on the part of the plaintiff here was, at all events, enough to call upon the defendant to prove that he was riding a reasonably manageable horse. [ERLE, C. J. Railway cases do not serve you. I do not assent to the doctrine that

mere proof of the accident throws upon the defendants the burden of showing the real cause of the injury. All the cases where the happening of an accident has been held to be *prima facie* evidence of negligence, have been cases of contract. WILLIAMS, J. The Lord Chief Justice in terms lays down the rule, in *Cotton v. Wood*, 8 Com. B. N. S. 568, in the way he has just expressed himself.] The question is, whether the learned recorder was justified in saying that there was no evidence of negligence here; whether there was not enough to call upon the defendant for an answer, as in the case of *Gibbon v. Pepper*, 2 Salk. 637, 1 Lord Raym. 38, 4 Mod. 404.

ERLE, C. J. I am of opinion that this rule should be discharged. The action is brought for damage caused by the negligence of the defendant; and the question is, whether we can see upon the notes of the learned recorder any evidence of negligence on the part of the defendant which that learned judge ought to have left to the jury. I am of opinion that the plaintiff, in a case of this sort, is not entitled to have his case left to the jury, unless he gives some affirmative evidence that there has been negligence on the part of the defendant. The sort of negligence imputed here is, either that the defendant was unskilful in the management of the horse, or imprudent in taking a vicious animal, or one with whose propensities or temper he was not sufficiently acquainted, into a populous neighborhood. The evidence is, that the defendant was riding the horse at a slow pace, that the horse seemed restless, and the defendant was holding the reins tightly, omitting nothing he could do to avoid the accident; but that the horse swerved from the roadway on to the pavement, where the deceased was walking, and knocked him down and injured him fatally. I can see nothing in this evidence to show that the defendant was unskilful as a rider, or in the management of a horse. There is nothing which satisfies my mind affirmatively that the defendant was not quite capable of riding, so as to justify him in being with his horse at the place in question. It appears that the defendant had only bought the horse the day before, and was for the first time trying his new purchase, — using his horse in the way he intended to use it. It is said the defendant was not justified in riding in that place a horse whose temper he was unacquainted with. But I am of opinion, that a man is not to be charged with want of caution because he buys a horse without having had any previous expe-

rience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will cause a horse to become restive. The mere fact of restiveness is not even *prima facie* evidence of negligence. Upon the whole, I see nothing which the learned recorder could with propriety have left to the jury.

WILLIAMS, J. I am entirely of the same opinion. Precisely the same question arose at the trial of this cause, as would have presented itself if the defendant had stood indicted for manslaughter. It has been contended that there was evidence for the jury, that the defendant was guilty of negligence in not using due care, or having sufficient skill to govern a vicious horse. I am clearly of opinion that, if this had been a trial for manslaughter, the evidence which was given here could not have been left to a jury. It is said that *prima facie* the defendant was guilty of negligence, because he was wrongfully on the foot-pavement. But the fact of his being on the foot-pavement is nothing unless he was there voluntarily; and to say the least, it is quite as consistent with the facts proved that he was there involuntarily, as that he was there by his own mismanagement. I would refer to the principle alluded to by the Lord Chief Justice in *Cotton v. Wood*, 8 C. B. N. S. 568, which it is most important to keep in mind in all these cases, viz., that where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury. It was further contended, that there was evidence to warrant the jury in coming to the conclusion, that the defendant was riding a horse which he knew not to be fit for the purpose. I am not sure that Mr. James is not right in saying that this declaration does not charge any thing of that sort. But, at all events, there was no evidence of a *scienter*.

WILLES, J. I am of the same opinion, though I must own that at the outset I was much inclined to entertain a contrary view. The discussion, however, which has taken place has satisfied me that I ought to concur with my lord and my learned brothers. The circumstance which very much weighed with me, was that here was a man riding on the foot-pavement, and, therefore, *prima facie* in the wrong. But, then, it must be remembered, that the witness who proved that fact, proved that he was there against his will, that the horse showed symptoms of running away, and

that the defendant was doing his best to hold him in, and in fact doing all he reasonably could to prevent the accident. He was there by the will of a horse which was running away with him, and resisting his efforts to restrain him. The injury occurred from the vicious and unmanageable character of the horse. But, as has already been pointed out, the fact of the defendant's riding an unmanageable horse in a public street is not to fix him with responsibility, unless it is shown that he knew the horse to be vicious and unmanageable; and that is negatived by the evidence here. It may be that a horse is unmanageable in consequence of want of care or skill on the part of the rider. Want of care is excluded by the evidence. Want of skill is matter of opinion; and it is not enough that the evidence is consistent with either view. It was very much urged, that, as the defendant had only bought the horse the day before, he was culpably negligent in trying him in such a place. But that would be imposing a restriction upon the rights of the owners of horses for which I find no warrant in the law. I cannot hold that the defendant is liable on that ground, when there was no reason, so far as the evidence goes, for supposing that the animal was a dangerous one. Upon these grounds, I am satisfied that I was wrong in thinking there was any evidence which could properly be left to the jury. It is perfectly demonstrable that there was not. There is yet another point in which I wish to make a remark, viz., whether the same evidence which is required in these cases would suffice to convict a man of manslaughter. I agree with my brother Williams, that that would be so in this case. In 1 East's P. C. 263, 264, treating of homicide, it is laid down that "the greatest possible care is not to be expected, nor is it required; but whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, the death of another, ought, at least, to show that he took that care to avoid it which persons in similar situations are most accustomed to do," — rather indicating that this should be shown by evidence on the part of the person charged. The practice is otherwise. I agree that the question would be the same in this case. But there has been a good deal of discussion in modern cases as to whether or not juries, on questions of this sort, ought to be told to look at the evidence as if they were dealing with a criminal case. It is, of course, immaterial from which side the evidence comes which shows that the homicide is

excusable. But, as at present advised, I cannot think that the jury in a civil action should be told that the question is the same as if the party was upon his trial for manslaughter. In a recent case in the Privy Council, — Cheyt Ram, app., Chowdhree Nowbut Ram, resp., 7 Moore's Indian Appeal Cases, 207, — on a question involving the genuineness or forgery of an instrument sued upon, which the courts in India had opportunity of personally inspecting, and held genuine, it was held to be necessary that the evidence impeaching the document be clear and strong to justify the appellate court in reversing the decree appealed from. Guarding myself with this qualification, I agree with the rest of the court in thinking that the evidence in this case was not such as ought to have been submitted to the jury.

KEATING, J. I am of the same opinion. If the evidence had shown that this horse was a quiet and manageable horse, and that the deceased at the time he met with the injury, which resulted in his death, was walking on the foot-pavement, I must own I should have thought that there was *prima facie* enough to call upon the defendant to show that he had used due care and skill, because then it would have been more consistent to assume that the accident arose from his want of care and skill. But here the evidence gets rid of that difficulty; for it shows that the beast was restless at the time, that he took fright, and that the defendant against his will, and not negligently, inasmuch as he was doing all he could to avoid it, got placed in the position from which the mischief arose. That being so, the case is left in this position, that it is equally probable that there was not, as that there was, negligence on the part of the defendant. The plaintiff, therefore, fails to sustain the issue the affirmative of which the law casts upon her. *Rule discharged.*

BYRNE v. BOADLE.

(2 Hurl. & C. 722. Exchequer, England, Michaelmas Term, 1868.)

Presumption of Negligence. The plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him. *Held*, sufficient *prima facie* evidence of negligence for the jury to cast on the defendant the onus of proving that the accident was not caused by his negligence.

DECLARATION. For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that, by and through the negligence of the defendant by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified. Plea, not guilty.

At the trial before the learned assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follows: A witness named Critchley said: "On the 18th July, I was in Scotland Road, on the right side going north; defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings). "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned assessor was of that opinion, and non-suited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with £50 damages, the amount assessed by the jury.

Little, in the present term, obtained a rule nisi to enter the verdict for the plaintiff, on the ground of misdirection of the learned assessor in ruling that there was no evidence of negligence on the part of the defendant, against which

Charles Russel now showed cause. — First, there was no evidence to connect the defendant or his servants with the occurrence. It is not suggested that the defendant himself was present, and it will be argued that upon these pleadings it is not open to the defendant to contend that his servants were not engaged in lowering the barrel of flour. But the declaration alleges that the defendant, by his servants, so negligently lowered the barrel of flour, that by and through the negligence of the defendant, by his said servants, it fell upon the plaintiff. That is tantamount to an allegation that the injury was caused by the defendant's negligence, and it is competent to him under the plea of not guilty, to contend that his servants were not concerned in the act alleged. The plaintiff could not properly plead to this declaration that his servants were not guilty of negligence, or that the servants were not his servants. If it had been stated by way of inducement that at the time of the grievance the defendant's servants were engaged in lowering the barrel of flour, that would have been a traversable allegation, not in issue under the plea of not guilty. *Mitchell v. Crassweller*, 13 Com. B. 237, and *Hart v. Crowley*, 12 A. & E. 378, are authorities in favor of the defendant. Then, assuming the point is open upon these pleadings, there was no evidence that the defendant, or any person for whose acts he would be responsible, was engaged in lowering the barrel of flour. It is consistent with the evidence that the purchaser of the flour was superintending the lowering of it by his servant, or it may be that a stranger was engaged to do it without the knowledge or authority of the defendant. [POLLOCK, C. B. The presumption is that the defendant's servants were engaged in removing the defendant's flour; if they were not it was competent to the defendant to prove it.] Surmise ought not to be substituted for strict proof when it is sought to fix a defendant with serious liability. The plaintiff should establish his case by affirmative evidence.

Secondly, assuming the facts to be brought home to the defendant or his servants, these facts do not disclose any evi-

dence for the jury of negligence. The plaintiff was bound to give affirmative proof of negligence. But there was not a scintilla of evidence, unless the occurrence is of itself evidence of negligence. There was not even evidence that the barrel was being lowered by a jigger-hoist as alleged in the declaration. [POLLOCK, C. B. There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. In some cases the courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions.] On examination of the authorities that doctrine would seem to be confined to the case of a collision between two trains upon the same line, and both being the property and under the management of the same company. Such was the case of *Skinner v. The London, Brighton, and South Coast Railway Company*, 5 Exch. 787, where the train in which the plaintiff was, ran into another train which had stopped a short distance from a station, in consequence of a luggage train before it having broken down. In that case there must have been negligence, or the accident could not have happened. Other cases cited in the text-books in support of the doctrine of presumptive negligence, when examined, will be found not to do so. Amongst them is *Carpue v. The London and Brighton Railway Company*, 5 Q. B. 747, but there, in addition to proof of the occurrence, the plaintiff gave affirmative evidence of negligence, by showing that the rails were somewhat deranged at the spot where the accident took place, and that the train was proceeding at a speed which, considering the state of the rails, was hazardous. Another case is *Christie v. Griggs*, 2 Camp. 79, where a stage-coach in which the plaintiff was travelling broke down in consequence of the axle-tree having snapped asunder. But that was an action on the contract to carry safely, and one of the counts imputed the accident to the insufficiency of the coach, of which its breaking down would be evidence for the jury. [POLLOCK, C. B. What difference would it have made, if, instead of a passenger, a bystander had been injured?] In the one case, the coach proprietor was bound by his contract to provide a safe vehicle, in the other he would only be liable in case of negligence. The fact of the accident might be evidence of negligence in the one case, though not in the other. It would seem, from the case of *Bird v. The Great Northern Railway Company*, 28 L. J. Exch. 3, that the

fact of a train running off the line is not *prima facie* proof, where the occurrence is consistent with the absence of negligence on the part of the defendants. Later cases have qualified the doctrine of presumptive negligence. In *Cotton v. Wood*, 8 C. B. N. s. 568, it was held that a judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In *Hammack v. White*, 11 Com. B. N. s. 588, 594, *ante*, p. 570, 575, Erle, J., said, that he was of opinion "that the plaintiff in a case of this sort was not entitled to have the case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant." [POLLOCK, C. B. If he meant that to apply to all cases, I must say, with great respect, that I entirely differ from him. He must refer to the mere nature of the accident in that particular case. BRAMWELL, B. No doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way, and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence.] The law will not presume that a man is guilty of a wrong. It is consistent with the facts proved that the defendant's servants were using the utmost care and the best appliances to lower the barrel with safety. Then why should the fact that accidents of this nature are sometimes caused by negligence raise any presumption against the defendant? There are many accidents from which no presumption of negligence can arise. [BRAMWELL, B. Looking at the matter in a reasonable way, it comes to this: an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury.] Unless a plaintiff gives some evidence which ought to be submitted to a jury, the defendant is not bound to offer any defence. The plaintiff cannot, by a defective proof of his case, compel the defendant to give evidence in explanation. [POLLOCK, C. B. I have frequently observed that a defendant has a right to remain silent unless a *prima facie* case is established against him. But here the question is whether the plaintiff has not shown such a case.] In a case of this nature, in which the sympathies of a jury are with the plaintiff, it would be

dangerous to allow presumption to be substituted for affirmative proof of negligence.

Little appeared to support the rule, but was not called upon to argue.

POLLOCK, C. B. We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

BRAMWELL, B. I am of the same opinion.

CHANNELL, B. I am of the same opinion. The first part of the rule assumes the existence of negligence, but takes this

shape, that there was no evidence to connect the defendant with the negligence. The barrel of flour fell from a warehouse over a shop which the defendant occupied, and therefore *prima facie* he is responsible. Then the question is, whether there was any evidence of negligence, not a mere scintilla, but such as in the absence of any evidence in answer would entitle the plaintiff to a verdict. I am of opinion that there was. I think that a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it. I agree that it is not every accident which will warrant the inference of negligence. On the other hand, I dissent from the doctrine that there is no accident which will in itself raise a presumption of negligence. In this case I think that there was evidence for the jury, and that the rule ought to be absolute to enter the verdict for the plaintiff.

PIGOTT, B. I am of the same opinion.

Rule absolute.

Historical.—Actions for the negligent performance of sealed contracts are probably as old as the writs of trespass and covenant. There is no suggestion in any of the books that an action would not always lie as well for the ill, *i.e.*, negligent, performance as for the non-performance of the undertaking; on the contrary, the clear implication, if not the decisive evidence, is that it would so lie. The second writ of trespass in the Register (Original Writs, p. 165 b) is one in which the defendant is commanded to keep his covenant with the plaintiff to pay damages for *unfaithfulness* in the default (*infidelitatem in defectu*) of one T., apprenticed to the plaintiff. See also the case of the vessel overladen, whereby the plaintiff lost his horse, *infra*, in which counsel for the defence contended that the plaintiff should have had a writ of covenant; and further Fitzherbert's Nat. Brev. 145. So, too, Bracton says, "Item

poterit injuria sub se continere *transgressionem*, ut si quid presumatur contra statuta regis et regni excedendo modum et mensuram, vel faciendo citra debitum, videlicet minus quod deberet, per malitiam et fraudem, *negligentiam et omissionem*. 101 b.

But it was by no means true that a man could from the earliest times maintain an action for the negligent performance of a verbal contract. Perhaps the only case in which an action would lie before the Statute of Westminster 2, c. 24 (under which actions on the case originated) was where a bailee had by a negligent attention to his trust lost, or wasted, or impaired the value of his goods; thereby subjecting himself to a writ of detinue, or, in earlier times, of debt (for debt originally included detinue. See *ante*, p. 421.) But many cases must have occurred for which the existing writs of covenant, debt, and detinue were inad-

equate and unsuited; and the parties were left to such redress as the king or his chancellor would afford them. Such were many cases of the modern *assumpsit*, an action which on this account is sometimes called an equitable remedy. See *Stratton v. Rastall*, 2 T. R. 370; *Moses v. Macferlan*, 2 Burr. 1005, 1012.

And what was true of negligence in contract was also generally¹ true (before the above-named statute) of damage from negligence apart from contract. In modern times it has been held that trespass *vi et armis* may sometimes be maintained for damage caused by negligence. Thus, in *Blin v. Campbell*, 14 Johns. 432, it is said that if the injury be attributable to negligence, though it were immediate, the party injured has an election either to treat the negligence of the defendant as the cause of the action and declare in case, or to consider the act itself as the injury and declare in trespass. See 1 Chitty, Pleading, 127; *Leame v. Bray*, 3 East, 593; *Case v. Mark*, 2 Ohio, 169; *Schuer v. Needer*, 7 Blackf. 342; *Strohl v. Levan*, 39 Penn. St. 177. But in this class of cases the plaintiff might as well have declared in trespass without alleging the defendant's negligence; and we apprehend that no authority has gone so far as to say that trespass is (or was, when in vogue) maintainable when the plaintiff's case depended upon the proof of negligence; if he could not maintain an action without such proof, case was the form of suit.

At all events, the old books furnish no instance of trespass for pure negligence; and until after the Statute of Westm. 2, the injured party was probably without redress by action at law.²

Bracton does indeed mention the *actio legis Aquiliæ* (in which much of the law of *culpa* apart from contract is laid down) as an existing remedy; but there is ground for doubt whether it was ever used as a mode of redress for damage caused by negligence. After having first barely mentioned the action in an enumeration of actions which arise *ex maleficiis* (p. 103, § 8), he says on the next page (103 b, § 1, c. 4), "*Actio vero legis Aquiliæ de hominibus per feloniam occisis vel vulneratis dabitur propinquioribus parentibus, vel extraneis homagio vel servitio obligatis, ita quod eorum intersit agere.*" And this is all that he says upon the subject. Now the above rule corresponds to the opening paragraph of the Aquilian law, which gave a special remedy where any one had wrongfully slain another's slave or beast; "*si quis alienum hominem alienamve quadrupedem . . . injuria occiderit;*" Inst. Just. lib. 4, tit. 3; Gaius, book 3, §§ 210-219; and it may be safely conjectured that Bracton simply took a familiar Roman name to designate an existing right of action, the subject-matter of which was related to that of the opening clause of the above-named law, — a thing which it is clear he often did.³ It is hardly to be supposed, if the rest (which is far the most impor-

¹ The exceptions, if such they were, being cases under the writs *de reparatione facienda* and *curia claudenda*. See Fitzh. N. B. 127, and 127 G.

² Several writs of *assumpsit* for negligence are given in the Register under the title *De Transgressionibus*; but the term *vi et armis* is omitted, which shows that they were writs in case. Register, 110, *De pipa vini curianda*; 110 b, *De equo infirmo sanando* and *De Columbari reparando*. The sentence above quoted from Bracton, closing with the words *negligentiam et omissionem*, evidently refers to duties undertaken and imperfectly performed, whereby an active injury was sustained.

³ See Bracton, 101 b-103 b, *passim*; e.g., Bracton mentions the *actio furti* of the Roman law

tant part) of the Aquilian law prevailed in his time, at least as a ground of action in the King's Court, that it would not have been noticed. Besides, neither Fleta nor Britton makes any mention of this action; nor have we found any allusion to it in the Year Books.

We have not overlooked the fact that Bracton and Fleta treat of a right of action for *culpa*: but this is where the *culpa* arises out of contract (bailment), and the subject is treated by Fleta under the action of *debt*. Bracton, lib. 3, tract. 1, c. 2, pp. 99, 99 b; Fleta, lib. 2, c. 56, p. 120, *De actione debiti*. See also Glanvill, lib. 10, c. 3, 13. The language of Bracton and Fleta is almost literally that of the Institutes. See lib. 3, tit. 14, 15.

Mr. Spence, following Mr. Reeves, has shown how the action of *assumpsit* was worked out under the St. of Westm. 2; but he did not point out the fact that the action for negligence as a tort was worked out in the same way. Nor has Mr. Reeves given any special attention to this subject. 1 Spence, Eq. 241-244; 2 Reeves's Hist. Eng. Law, 508-510, Finl. ed.

The evolution of *assumpsit* will show how the action for damage by negligence (short of trespass) was wrought out.

In framing the new writs for the plaintiff's special case the writ of trespass was generally taken for the model.

The King's Court had jurisdiction in trespass; and the revenue of the crown from the purchase of writs could not have been small. The judges were not slow to improve an opportunity of increasing the income from this source; and hence probably the fact that the writ of trespass (which would draw after it trespass on the case) was taken as the basis for the new writs. The Common Bench had jurisdiction of covenant and debt, and if the new actions had been allowed to go that way, the benefits would not have accrued to the king's treasury. See 1 Spence, Eq. 240, 241. Besides, the Court of Chancery was quietly gaining jurisdiction over what were afterwards termed *assumpsits*, and hence it was necessary that action should be taken if any advantage was to be obtained under the statute. Ib. 243.

This is probably the explanation of the fact that debt and covenant were not adopted as models for the action on the case *ex contractu*.

The first case, or one of the first cases, in which an action for negligent performance of a contract was brought shows the ground upon which it was supposed that the new writ was to be sustained, if at all. The plaintiff brought trespass on the case against a man, and counted for that he had undertaken to carry the plaintiff's horse in his boat over the Humber, safe and

as existing; but no writ of the kind is to be found in the Register, nor does Bracton mention any. The term seems to be used merely to indicate the existence of a private remedy for goods stolen; and this existed in the appeal of robbery. See *ante*, pp. 349, 420. So Bracton speaks of the *actio vi bonorum raptorum*; but, in describing it, he simply says that it lies for goods taken away by force or robbery from the owner or one in whose custody they lie, being partly paid for. He gives no intimation that the peculiar and severe law of Justinian prevailed (Inst. lib. 4, tit. 2); nor does he make mention of any special writ of the above designation. It is pertinent to observe that the above-mentioned right of the kinsman of a man slain to recover compensation for the wrong was essentially the same as the wergeid or blood-money of the Anglo-Saxons and Sallian Franks; this being the sum paid to the family of a man who had been slain, as a compensation for the death of their kinsman. 1 Thorpe's Ancient Laws and Inst. p. 5, and notes.

well, but that he overloaded his boat with other horses, by which overloading the plaintiff's horse perished; *a tort et a damages*, &c. It was objected to the writ that it supposed no *tort* in the defendant, but on the other hand showed that the plaintiff should have brought a writ of covenant. But it was said by one of the judges that the defendant committed, as it should seem, a trespass in overloading the boat, by which the horse perished; and the writ was sustained. 21 Lib. Ass. (Edw. 3) 41. "Thus," says Mr. Reeves, "the notion of a trespass, or a *malfeasance*, was the principle upon which the application of this new remedy was explained and justified." 2 Hist. Eng. Law, 395, Finl. ed.; 1 Spence, Eq. 241.

In another case an action was brought against a farrier for that, being employed to shoe the plaintiff's horse, *quare clavum fixit in pede equi sui in certo loco per quod proficuum equi sui per longum tempus amisit*, &c. To this writ it was objected that it was in trespass, and yet did not allege *vi et armis* or *contra pacem*; but it was sustained as according to the plaintiff's case, 46 Edw. 3, p. 19.

Soon afterwards a writ of trespass on the case was brought against a surgeon, for that the plaintiff's hand had been hurt and the defendant undertook to cure it, but by his negligence and want of care the injury was made worse and became a mayhem; and the writ was held good without alleging *vi et armis* or *contra pacem*, 48 Edw. 3, p. 6. Comp. Inst. Just. lib. 4, tit. 3, §§ 6, 7, under the Aquilian law. And see a like case, 43 Edw. 3, p. 88, pl. 88; s. c. Register, 110 b, where the writ is *assumpsisset*.

So, too, a writ had been brought against an innkeeper for the loss of

luggage through the negligence of the defendant and his servants; and it was held good, as being according to the plaintiff's case. 42 Edw. 3, p. 18. See also 3 Hen. 6, p. 36; 11 Hen. 6, p. 18; 19 Hen. 6, p. 49.

The next step was more difficult, viz., to sustain a writ of this kind for a pure non-feasance. "It was thought somewhat harsh to give the name of trespass to a thing which was never done." 2 Reeves's Hist. 508, Finl. ed. And the attempt was unsuccessful in the first cases. In 2 Hen. 4, 3 b, the plaintiff brought an action against a carpenter for that he had undertaken (*assumpsisset*) to build within a certain time, and had not done it. It was objected again that the writ sounded in covenant. This was supported by Brian, who at the same time conceded that perhaps if the writ had said that the work had been begun, and afterwards been stopped through negligence, it might be otherwise. But as the complaint alleged was a non-feasance, the writ was dismissed.

An action precisely like this was brought a few years after, with the same concession and the same result. 11 Hen. 4, p. 38; Reeves, *ut supra*, p. 509. And in many other cases the matter was a subject of discussion, the prevailing opinion being that for a pure non-feasance trespass on the case would not lie. Year Books, 3 Hen. 6, p. 36; 14 Hen. 6, 18; 20 Hen. 6, 34; 21 Hen. 6, 55.

But where any thing was alleged which could be construed into an active injury, the writ was allowed; and finally, in the reign of Henry 7, the step was fully taken, and it was held that an action on the case would lie as well for a non-feasance as for a mis-feasance. 21 Hen. 7, p. 41. "If," said Fineux,

C. J., in this case, "one covenants to build me a house by such a day, and does not do it, I have an action on the case for this non-feasance as well as if he build it imperfectly. And so it is if one make a bargain with me that I shall have his land to me and my heirs for £20, and he refuses to perform it, I shall have an action on the case, and there is no occasion for a *subpoena*." See also to the same effect 14 Hen. 6, p. 18; 21 Hen. 6, p. 55; 22 Hen. 6, p. 44; 2 Hen. 7, p. 11; 2 Reeves's Hist. 607, Finl. ed.

"Hence," observes Mr. Spence, "the origin of the modern action of *assumpsit*, which is now in such constant use. It is, however," he adds, "only from the end of the reign of Elizabeth, A. D. 1602, that this kind of action came into general use, so far as to supersede the necessity of the interference of the Court of Chancery in cases to which that action is now applied." 1 Equity, 243.

The same language might have been used of the modern action for negligence. There are other cases (if those above mentioned were not sufficient) which support the view that actions for negligence, apart from bailment or contract in general, passed through the same discussion and doubts to the same result.

To begin with a case of malfeasance (as to which, indeed, no doubt was ever raised of the right of action), the case in the Year-Book, 12 Edw. 4, p. 13, pl. 10, may be cited, where the plaintiff brought a writ of trespass on the case for that he had bailed a horse to the defendant for safe-keeping; and the defendant *equum illum ita negligenter custodivit* that on account of the want of good keeping the horse perished. The defendant pleaded that the plain-

tiff had previously brought detinue for the same horse, in which action the defendant had waged his law. The plaintiff contended that that was no estoppel, for his present action was brought *only for the defendant's negligence*. The case was decided for the defendant upon the estoppel; but no doubt was expressed upon the goodness of the writ. Such cases had doubtless been upheld from the first attempt. See the sentence quoted from Bracton, *supra*, p. 584.

The next step taken was to sustain the action, as *supra*, where the only malfeasance was the effect of the negligence. Thus, in one case, the plaintiff brought a writ of trespass on the case against a man for the non-repair of a sea-wall which the defendant ought, and by custom beyond memory was bound, to repair; by reason of which non-repair the plaintiff's land and meadows were flooded. It was objected, as in the above cases, that the writ supposed no trespass; but it was replied that the flooding the plaintiff's premises was to be considered a trespass; and the defendant was required to answer over. 29 Edw. 3, p. 32. See a like case in the Year-Book, 7 Hen. 4, p. 8, pl. 10. These cases show that actions for malfeasance were considered as maintainable long before the case last above given. Indeed, cases like the above were actionable in the time of Bracton and, probably, of Glanvill, giving rise to an assize of nuisance or of novel disseizin. See *ante*, p. 462.

Trespass on the case for non-feasance *ex delicto* had been maintained for a considerable time before the above quoted doctrine of Fineux, C. J., as to *assumpsit*. Thus, in 22 Hen. 6, p. 46, pl. 36, trespass on the case was brought against the Abbot of Woburne, for that he ought to find a chaplain to chant

divine service in a certain chapel, as he and all his predecessors from time immemorial had done, which he had neglected to do; and the action (after an amendment of the writ, stating more accurately the prescription) was maintained.

In another case *Moile, J.*, said that if a man should go to an inn to obtain lodging, and should be refused, he could maintain trespass on the case against the innkeeper; and though this was doubted by one of the other judges, the doubt was based upon a question of the duty to "entertain *volens, volens*." 39 Hen. 6, p. 18, pl. 24.

When, finally, it had been decided that case lay for a non-feasance in contract, no question appears to have been raised that the rule was of general application to all cases of a breach of legal duty, whether *ex contractu* or *ex delicto*. See the cases referred to by Comyns, *Action upon the Case for Negligence*.

But notwithstanding all barriers to the maintenance of actions for negligence were thus broken down, it was a long time before they became so common as to attract special attention. No title of Negligence is to be found in the Year-Books, or in any of the early Abridgments or Digests. The cases must be looked for under the head of *Action sur le Cas*, or under *Trespass*. Comyns was the first to introduce the title Negligence into the books; and even he makes it one of the divisions of the general title *Action upon the Case*.

Very few principles, except of the most elementary character, were decided in the cases of the Year-Books. The questions discussed were mostly in regard to the form of the writ, or its

extension to cases of a very simple nature, as we have seen. Discussions seem never to have led to an examination of the Roman law of negligence, or even to a citation of Bracton or Fleta; and we may be tolerably certain that the law of negligence, as declared by the judges who figure in the Year-Books, was not of foreign extraction.

The first extensive examination (by the courts) of the Roman law of negligence, and attempt to apply its doctrines to English jurisprudence, was made by Lord Holt in *Coggs v. Bernard*, 2 Ld. Rayn. 909. This, however, was on the side of bailment; and of this subject we do not treat. The system of law laid down in that case, with its three degrees of negligence (upon the most erroneous construction of the Roman law¹) has happily been mainly confined to the title *Bailment*; and it is perhaps fortunate, with the experience of a century and a half before us, that Lord Holt had no occasion to consider the Roman law of negligence as applicable to matters of pure tort. To what limited extent the Roman law has been made use of in this particular in more recent times will appear as we trace the course of the existing law.

Negligence as a Question of Law or of Fact. — We propose to consider now the general principles that enter into the inquiry how far negligence is a question of law, and how far it is a question of fact; and this, first, apart from the authorities.

The use of the term "negligence" necessarily implies some standard by which the acts or omissions to which it relates are to be judged; and in the two questions, — What is the standard;

¹ See Wharton, *Negligence*, §§ 57 *et seq.*; Story, *Agency*, § 184, note, Green's ed.

and Where does it exist?—lies the whole law of negligence.

In answer to the first question it is generally said that the standard in the English law is the conduct of the prudent man. But this standard, though sufficient for most cases, is sometimes misleading.

Suppose the defendant, a man without experience in driving, were to get into a carriage in a crowded thoroughfare, on a gala day, and attempt to drive an unruly horse through the street, in order to assist the owner, and that without any lack of care or effort on the part of the defendant, the horse should break away from him and injure people in the street: now if the question is, Did the defendant act as a prudent man would have acted under the same circumstances? the jury (or judge, if he should assume the answering of it) would be very likely to say that he did. The ideal prudent man might well have undertaken the same courtesy, and without exercising any more care.

Or, to take another case, suppose a blacksmith were to find a watch by the roadside, and, discovering it to be full of dirt and gathering rust, should attempt to clean it and put it in order, and in doing so, though exercising the greatest care, should injure the watch: if in an action against him the question should be, Did the defendant act as a prudent man in his situation might have done? the answer could not but be in the affirmative. A watchmaker would have done the same thing.

The above cases should indicate the limits of the test of the prudent man's conduct. That test holds good where the defendant was at the time engaged in his own business or avocation, or in some other in which he has acquired

skill, or in something which all men can do alike (as, for instance, drawing water). Within these limits the test requires that the defendant should be judged by the conduct of the prudent man engaged in the particular labor as of his own calling (unless it be a thing which all can do alike), whether he be a digger of ditches or a workman in steel.

Beyond cases of this class the test fails; and if it be made to appear that the defendant has stepped out of his own business, it should seem that a *prima facie* case had been made against him. The judge would not presume the defendant to have skill in all kinds of business; and it would, therefore, be for the party to satisfy the jury that he had acquired the skill of a competent man of that business. And then it would be necessary to show that he had exercised his skill as the prudent man of that business would have done. In a word, the standard of a man *dehors* his own business is both skill in the thing assumed and the conduct of the prudent man.

If it should be said that this after all is nothing more than the test of the prudent man's conduct, because it is not the part of a prudent man to go out of his own business, the answer is that this is using the word "conduct" in a double sense, as relating both to the degree of care exercised in doing the act which resulted in the damage, and to the change of business. And, besides, it is not always true that the prudent man would not have made the change, for a man *may* be equally and thoroughly skilled in several kinds of business.

In contractual relations the above would not be an accurate discrimination of liabilities. If, for example, I

should bail an unruly horse to an inexperienced driver, to be driven through a crowded street, and the horse, in spite of all effort, should run away and break the carriage, I could not maintain an action against the bailee for the damages, unless he had imposed upon me, or had agreed to pay me for any damages which might be incurred. And the reason is that I consented to the risk, — *volenti non fit injuria*, — and could only require of him such care as he could exercise. So, if I should take my watch to a blacksmith for repair, I could not maintain an action against him for damage done to it, provided he had done as well as he could.

But in the case of a pure tort (that is a wrong not arising out of contract) the defendant has undertaken or omitted some duty without the consent of the plaintiff; he has, therefore, taken his own risk.

It would thus seem that the doctrine concerning the diligence of an "expert" or a "non-expert," which Dr. Wharton has learnedly set forth in his work on Negligence, §§ 26 *et seq.*, is applicable only to the law of bailment; and that *dehors* matters of contract the law requires of all men the diligence of experts (this term being used to designate a man properly engaged in his own business, as *supra*, in contradistinction from one otherwise employed; i. e., a non-expert). That is to say, if a non-expert undertake the business of an expert, he will be liable for damage done, because he is a non-expert in that business.¹

In all other cases of tort than those above mentioned, the common test — the conduct of the prudent man — is, as we have said, sufficiently accurate. But

what constitutes the standard in each of these cases is a question of more difficult solution. It cannot be answered in the abstract. Sometimes it is matter of law, and sometimes it is matter of fact; and, even in cases where the standard is defined by the judge, no general rule can be safely laid down until a particular case is stated. We must, then, leave this subject for consideration under special cases.

The question where the standard by which the defendant's conduct is to be judged is to be found, whether in the breast of the judge or in the testimony of witnesses, is no less difficult, and must be answered in the main in the same way. In some cases we shall find the judge tacitly ruling upon the facts before him, supplying from his own breast the rule by which the defendant's liability is to be tried; in others submitting to the jury the rule to be applied. But while the subject of the proper province of the court and jury in these cases appears, and is in fact, much confused, it is apprehended that there are certain clear principles underlying it, which, if observed, will relieve the subject of somewhat of its difficulty.

1. The question whether a man is guilty of negligence must ever be a question of law where all the facts in dispute are found, *including the conduct of the prudent man* (or the skill and prudence of the defendant) in the particular situation. The duty of the judge does not stop with presiding at the trial, and deciding upon the competency of evidence; he is required to instruct the jury as to the legal principles which must govern their decision. In the case put nothing more can be done

¹ As a non-expert would therefore be liable where an expert would not, these terms may still be used of pure torts; but the sense will be reversed from their signification in bailment.

until a rule of law is declared; and to do this is the province of the court.

2. But in some cases (1) the conduct of the prudent man (or the propriety of the action of the defendant himself as a non-expert) in the situation is matter of common knowledge; and neither the judge nor the jury would need the testimony of others upon the subject. In such cases the question may properly be answered by the judge. In other cases (2) the standard has already been settled by law; and in still others (3) no standard exists, and it becomes necessary to declare what it should be. We shall find that most of the cases in which the judge has assumed to lay down, expressly or by implication, the rule of conduct of the prudent man are cases of one of these classes. In these cases the jury are called upon to say simply whether the defendant conformed to such and such a standard. In all other cases the jury must further find the standard by which the defendant is to be tried.

3. When it is said that the question of negligence is one of mixed law and fact, to be submitted to the jury under instructions for their guidance, nothing different in truth is meant. In such cases the judge says that if such and such facts be found (constituting the supposed act or omission of the defendant, and including the conduct of the prudent man or not, as *supra*), the verdict must be for the plaintiff.

It remains to see whether the above propositions are borne out by the authorities.

The first one (where all the facts, including the prudent man's conduct, are found) is too evident for further mention. As to the second and third, which as we have said are in substance the same, the principal case, *McCully v.*

Clark, is authority. In that case the standard of conduct was submitted to the jury; and this was held right, because the standard was uncertain. The court could not know what it was, at least upon the facts proved. "The question," said the learned judge, "was not alone what the defendants had done or left undone, but in addition what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve. . . . The points proposed to the court assumed that the defendants were under obligation completely to extinguish the fire in the coal-pile within a designated time."

In a subsequent case the same court say that "where there is such an obvious disregard of duty and safety as amounts to misconduct the court may declare it to be negligence as matter of law." *West Chester & Phila. R. Co. v. McElwee*, 67 Penn. St. 311.

In another case in which the plaintiff had brought an action for injuries caused by the defendants, a railroad company, at their intersection with the public highway, it was held that a failure to look out for the approaching train was negligence. "In most cases," said the court, "the standard is variable, and it must be found by a jury. But when the standard is fixed, when the measure of duty is defined by the law, entire omission to perform it is negligence. In such a case the jury have but one of these inquiries to make. They have only to find whether he upon whom the duty rests has performed it. If he has not, the law fixes the character of his failure and pronounces it negligence. Of this there are many illustrations. Now, that it is the duty of a traveller when approaching the intersection of a railroad with

a common highway to look out for approaching trains or engines, the court below asserted more than once, and correctly, that standard of duty is fixed by the law." *North Penn. R. Co. v. Heileman*, 49 Penn. St. 60. See also, upon this particular point of injuries at railway crossings, *Reeves v. Delaware & L. R. Co.*, 80 Penn. St. 464; *Pennsylvania R. Co. v. Ogier*, 85 Penn. St. 60; *Pennsylvania R. Co. v. Beale*, 30 Leg. Int. 232; *Pennsylvania R. Co. v. Weber*, 72 Penn. St. 27; *Butterfield v. Western R. Corp.*, 10 Allen, 532; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; *Gillespie v. Newburgh*, 54 N. Y. 468, and cases cited; *Dascomb v. Buffalo, &c. R. Co.*, 27 Barb. 221; *French v. Taunton Branch R. Co.*, 116 Mass. 537.

In *Railroad Co. v. Stout*, 17 Wall. 657, where it was assigned for error that the judge should have ruled upon the facts that there was no evidence of negligence, the court, by Hunt, J., said: "It is true in many cases that where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts comes in question rather than where deductions or inferences are to be made from the facts. . . . In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and

an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury." But *quære* if even this be always true. See p. 594, *Dixon v. Bell*.

So, in *Hackford v. New York Cent. R. Co.*, 53 N. Y. 654, it was held that if the act or omission "of itself constitutes negligence," it is the province of the court to pass upon it; but if the fact depends upon the credibility of witnesses, or upon inferences to be drawn from the circumstances proved, about which men might honestly differ, then the question is for the jury.

The Supreme Court of Michigan, by Cooley, C. J., have said, "It is a mistake to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true

only of that class of cases where a party has failed in the performance of a *clear legal duty*. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences must either be certain and uncontrovertible or they cannot be decided upon by the court." *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99. And finally see *Cox v. Burbridge*, 13 Com. B. N. S. 430, 437, *infra*, where the court decide that it is no evidence of negligence that a child is kicked on the highway by a horse straying there; as to which Erle, C. J., says, "And *everybody knows* that it is not at all the ordinary habit of a horse to kick a child on a highway." See also *Gaynor v. Old Colony R. Co.*, 100 Mass. 208.¹

The principal case, *Hammack v. White*, was a case in which the court (or at least one of the judges) assumed to know the actual conduct of the prudent man. "It appears," said Erle, C. J., "that the defendant had only bought the horse the day before, and was for the first time trying his new purchase, — using the horse in the way he intended to use it. It is said that the defendant was not justified in riding in that place a horse whose temper he was unacquainted with. But I am of opinion that a man is not to be charged with want of caution because he buys a horse without having had any

previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing." The conduct of the prudent man, as thus appears, was plain, and evidence on the point was unnecessary. However, it may be safely surmised that the chief reason for the decision was found more in a conviction that the act of the defendant was proper and prudent *per se* than that it conformed to any general practice of the community. The general practice might itself be very reprehensible; and it would not be safe to found a rule of law upon its mere existence. The court seem to have taken the ground that it was for them to say whether a careful man, who had regard for the safety of others, would do as the defendant had done; and properly, for there were no elements of difficulty in the case which could be aided by the production of evidence. In this view the question was, what the standard should be rather than what it actually was.

Dixon v. Bell differs from *Hammack v. White* in that the act complained of was one of an isolated kind, as to which no actual practice existed in the community. The question to be decided therefore was, what standard should prevail in such a case. That is, it was like the question which we have presumed to have existed in the mind of the court in *Hammack v. White*. The duty was something to be prescribed and not proved. It was a question of

¹ Where a fact is matter of general knowledge, it seems to be a rule of wide application that the court may take cognizance of it. Upon a question of master and servant, *Cockburn, C. J.*, said: "It is a matter of universal knowledge and experience that in a great city like this persons do not employ their own servants to do repairs to the roofs of their houses or buildings; they employ a builder whose particular business it is to do it. That being a matter of universal practice, and of universal and common knowledge, I think this is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not." *Welfare v. Brighton Ry. Co.*, L. R. 4 Q. B. 693, 696.

public policy, and therefore for the cognizance of the court.

The doctrine, then, of the cases is, that where the standard is plain and certain (*i.e.*, to put it as we have stated it elsewhere, where it is matter of general cognizance, so as not to require evidence), it is not error for the judge to lay it down, or to say that, if such and such acts or omissions be proved, the defendant is guilty or not guilty; and *a fortiori* this is true where the standard has been already defined by law, or where the act is an isolated one, and cannot be aided by evidence. See 7 *Am. Law Rev.* 654, 655, 658.

And when the statement is made, as it often is, that where the facts are found, the question whether they constitute negligence is one of law, it will generally appear, as we have intimated, that the court speak with a case like one of the above before them. Thus in *Herring v. Wilmington & Raleigh R. Co.*, 10 *Ired.* 402, which was an action for killing one and injuring another of the plaintiff's slaves, the learned court said: "What amounts to negligence is a question of law. . . . The cars were running at the usual hour and at the usual speed, not through a village or over a crossing-place, or turning a point, but upon a straight line, where they could have been seen for more than a mile. The negroes might have been seen at the distance of half a mile. Whether the engineer saw them or not until he was too near to stop does not appear. There is no evidence that he was not in his place and on the look-out. It cannot be inferred from the fact that he made no effort to stop until he got within twenty-five or thirty yards of the negroes, for that is entirely consistent with the supposition that he had seen them for half a mile; because,

seeing them to be men, he naturally supposed they would get out of the way before the cars reached them, and might well have continued under this impression until he got near enough to see that they were either drunk or asleep, which he was not bound to foresee; and his being then too near to stop, so as to save them, was their misfortune, not his fault." The standard, it will be observed, was one of general cognizance, and could not have been made more plain by evidence.

In concluding this part of the note, it is proper to remark that as the standard is (ordinarily) that of the prudent man, the requirement of "due care" or "ordinary diligence," and the prohibition of "ordinary negligence" and "gross negligence," to use a common set of terms, implies one and the same thing, to wit, the exercise of that degree of care which prudent men exercise, or should exercise, in similar matters. If the defendant's act fall below the standard, he is liable; and degrees of negligence, as applied to liability, are thus effectually cut off.

See further, as to the province of the court and jury, *Baltimore & O. R. Co. v. State*, 36 *Md.* 366, referring to many cases; *Barton v. St. Louis, &c. R. Co.*, 52 *Mo.* 253; *Pendrill v. Second Ave. R. Co.*, 34 *N. Y. Superior*, 481; *Dickens v. New York Cent. R. Co.*, 1 *Abb. App. Dec.* 504; *Keller v. New York Cent. R. Co.*, 2 *Abb. App. Dec.* 480; *Rudolphy v. Fuchs*, 44 *How. Pr.* 155; *Feler v. New York Cent. R. Co.*, 49 *N. Y.* 47; *Bernhard v. Rensselaer & S. R. Co.*, 1 *Abb. App. Dec.* 181; *Cook v. New York Cent. R. Co.*, *Ib.* 432; *Jetter v. New York & H. R. Co.*, 2 *Abb. App. Dec.* 458; *Willard v. Pinard*, 44 *Vt.* 34; *Haskford v. New York & H. R. Co.*, 43 *How. Pr.* 222;

Schierhold v. North Beach, &c. R. Co., 40 Cal. 447; Smith v. Clark, 3 Lans. 208; Greenleaf v. Illinois, &c. R. Co., 29 Iowa, 14; Jenkins v. Little Miami R. Co., 2 Disney, 49; Eagan v. Fitchburg R. Co., 101 Mass. 315; Maloy v. New York & H. R. Co., 58 Barb. 182; Belton v. Baxter, 2 Sweeny, 339; Johnson v. Bruner, 61 Penn. St. 58; Pennsylvania Canal Co. v. Bentley, 66 Penn. St. 30; Buell v. Chapin, 99 Mass. 594; Quirk v. Holt, 1b. 164; Reynolds v. Hanrahan, 100 Mass. 313; Albert v. Blecker St. R. Co., 2 Daly, 389; Griggs v. Frankenstein, 14 Minn. 81; Carroll v. Minnesota Val. R. Co., 1b. 57; Kennayde v. Pacific R. Co., 45 Mo. 255; Detroit & M. R. Co. v. Curtis, 23 Wis. 152; French v. Taunton Branch R. Co., 116 Mass. 537; Schienfeldt v. Norris, 115 Mass. 17; Strong v. Connell, 1b. 575; Elkins v. Boston & A. R. Co., 1b. 190; Gee v. Metropolitan Ry. Co., Law R. 8 Q. B. 161. Consult also the valuable contribution of Mr. Holmes on The Theory of Torts, 7 Am. Law Rev. 652.

Presumptions of Negligence.—In the principal case, *Byrne v. Boadle*, we have an instance where, from the situation of the parties and the nature of the accident, a legal presumption of negligence is raised against the defendant. The barrel of flour fell out of the window of the defendant's shop; from which it was presumed that the article had been in the custody of the defendant. And as a barrel of flour would not ordinarily fall out of a window when proper care is taken in managing it, there was presumptive evidence of negligence on the part of the defendant. But as it was possible that the defendant was not the author of the injury, or, if he was, that he was

not in fact negligent, each of the presumptions was open to rebuttal.

But inasmuch as the burden of proof of actionable negligence is upon the plaintiff, cases in which such presumptions are claimed must be narrowly scrutinized. The circumstances (apart from contract) must be exceptional where the plaintiff escapes the common necessity of proving actual negligence. There are, however, such cases; and *Byrne v. Boadle* is not alone. A similar case went to the Exchequer Chamber about a year later. *Scott v. London Dock Co.*, 3 Hurl & C. 596. In this case the plaintiff proved that while in the discharge of his duties as a custom-house officer in front of the defendants' warehouse, in a dock, he was felled to the ground by several bags of sugar falling upon him. The judge at *nisi prius* directed a verdict for the defendants, on the ground of a want of evidence of negligence. The Court of Exchequer having granted a rule to set aside the verdict, that decision was sustained on appeal. Erle, C. J., said that the majority of the court had come to the following conclusions: There must be evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. The learned Chief Justice added that he and Mr. Justice Mellor had been unable to find in the case this reasonable evidence of negligence. (The majority consisted of Crompton, Byles, Blackburn, and Keating, JJ.)

In another case, the plaintiff was injured by the fall of a large packing-case belonging to the defendant, while making inquiries for the defendant in the door of a house in which the latter had offices. He had received a push from the defendant's servant, who was watching the packing-case; and immediately the case, which stood against a wall of the house, fell and struck him on the foot. There was no evidence why the packing-case fell, or who placed it against the wall. It was held that the facts showed a *prima facie* case of negligence. *Pigott, B.*, said that it was true that where the evidence was equally consistent with the existence or non-existence of negligence, there was no question for the jury. (See *Cotton v. Wood*, 8 Com. B. N. s. 568; *Smith v. First National Bank*, 99 Mass. 605). But inasmuch as packing cases did not usually fall of themselves, unless there had been some negligence in setting them up, the facts appeared to him to be consistent only with the existence of negligence. *Bramwell, B.*, took the same view. *Martin, B.*, thought that the facts were as consistent with the position that there was no evidence of negligence as the contrary, and that therefore the plaintiff had not made out his case. *Briggs v. O'iver*, 4 Hurl. & C. 403.

In *Cox v. Burbridge*, 13 Com. B. N. s. 430, the plaintiff, a child, sued for injuries caused by the kick of a horse. It appeared that the horse had been grazing on the highway. The plaintiff was playing in the road, when the horse, which was on the foot-path, kicked him. There was no evidence to show how the horse got to the spot, or that the defendant knew he was there, or that the animal was at all vicious, or that the child had done any thing to

irritate him. The case having been left to the jury, a verdict was given for the plaintiff; whereupon a new trial was granted, on the ground of a want of evidence of negligence. *Erle, C. J.*, said that it might be assumed that as between the defendant and the owner of the soil of the highway (which had not been accepted as such), it might be assumed that the horse was trespassing; or, if the way had been a public highway, that the owner might have been proceeded against under the Highway Act. But in considering the claim of the plaintiff against the defendant, the question whether the horse was a trespasser as against the owner of the soil, or whether he was amenable under the statute, had nothing to do with the case. He also thought that there was no evidence of negligence in the fact that the owner of the horse had allowed the animal to go upon the road unattended. He might have been put there by a stranger, or might have escaped from some enclosure without the owner's knowledge. But even if there were negligence, he thought that the plaintiff had not connected himself with the damage complained of. He thought that the well-known distinction was applicable, that the owner of an animal was liable only when the damage done was such as was likely to be caused by the animal, and that the owner knew it. In such cases there was no remedy without proof of the *scienter*. (See *ante*, p. 488.) "The owner of a horse," said the learned Chief Justice, "must be taken to know that the animal will stray if not properly secured, and make its way into his neighbor's corn or pasture. For a trespass of that kind the owner is, of course, responsible. But if the horse does something which is quite contrary to his nature, some-

thing which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has; and everybody knows that it is not at all the ordinary habit of a horse to kick a child on the highway." The other judges took the same view as to the necessity of the proof of a *scienter* of the viciousness in such a case. So, too, it is held that the mere fact of a man's driving on the wrong side of the road is no evidence of negligence in an action brought against him for running over a person who was crossing the road *on foot*. *Lloyd v. Ogleby*, 5 Com. B. N. s. 667.

In *Welfare v. London & Brighton Railway Co.*, Law R. 4 Q. B. 693, it was held that no presumption of negligence could be raised from the fact that the plaintiff was injured by the fall of a timber and a roll of zinc from the roof of a portico undergoing repair, under which he was standing. The Chief Justice observed that the only act of negligence that could be suggested in the case was, that the defendants had allowed a person to go upon the roof when it was in an insecure condition or not sufficiently strong to support his weight, so that the plank gave way under the weight of the man passing over it, and that as a consequence the plank fell down and injured the plaintiff. But this was not sufficient. It was incumbent upon the plaintiff to show further that the defendants knew, or had the means of knowing, or were bound to take steps to know, the condition of the roof; and it did not follow that because they knew that the roof needed repairing, they also knew that it would not bear the weight of a man.

Another ground taken was, that the person upon the roof had not been

shown to be in the employ of the defendant; and upon this ground, and the ground that there was no evidence that the man on the house was negligent, a more recent case before the same court has been distinguished. *Kearney v. London & Brighton Railway Co.*, Law R. 5 Q. B. 411, 413; s. c. Law R. 6 Q. B. 759. In this case the plaintiff was injured by the fall of a brick while passing under a railway bridge extending over the highway. The bridge rested on perpendicular brick walls, having pilasters; and from the top of one of these pilasters the brick fell, shortly after the passing of a train. It was held that these facts raised a presumption of negligence against the defendants. "My own opinion," said Cockburn, C. J., "is, that this is a case to which the principle *res ipsa loquitur* is applicable, though it is certainly as weak a case as can well be conceived in which that maxim could be taken to apply. But I think the maxim is applicable; and my reason for saying so is this: The company who have constructed this bridge were bound to construct it in a proper manner [there was no evidence, however, that it was not so constructed], and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now, we have the fact that a brick falls out of this structure and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the

defendants to use reasonable care and diligence, and I think the brick being too loose affords, *prima facie*, a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been from causes operating so speedily as to prevent the possibility of any diligence and care applied to such a purpose intervening in due time, so as to prevent an accident. But, inasmuch as our experience of these things is that bricks do not fall out when brickwork is kept in a proper state of repair, I think, where an accident of this sort happens, the presumption is that it is not the frost of a single night, or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that care on the part of the defendants which it was their duty to apply."

Mr. Justice Hennen dissented, and the case was carried to the Exchequer Chamber, where the judgment of the majority below was unanimously affirmed. Law R. 6 Q. B. 759.

In *Mullen v. St. John*, 57 N. Y. 567, it was decided that the fall of a building into the street was presumptive evidence of a neglect of proper care on the part of the owner. The court said that a person who erected a building upon a city street or upon an ordinary highway was under legal obligation to take reasonable care that it should not fall into the street; and buildings properly constructed did not fall without adequate cause. If no tempest or other external violence prevailed, the fair presumption was that the fall occurred through the

ruinous condition of the building, which could scarcely have escaped the notice of the owner. The case was decided chiefly upon the authority of *Kearney v. London & Brighton Railway Co.*, *supra*. See further, as to the duty to repair, *Kirby v. Boylston Market Association*, 14 Gray, 249; *Lowell v. Spalding*, 4 Cush. 277; *Oakham v. Holbrook*, 11 Cush. 299; *Regina v. Watts*, 1 Salk. 357; *Rector v. Buckhart*, 3 Hill, 193.

In *Lehman v. Brooklyn*, 29 Barb. 234, an action was brought against a city for negligently causing the death of a young child. The proof was that the city kept a well, the mouth of which was level with the sidewalk. The well was in the sidewalk, but two or three feet from the flagging. It was provided with a cover, having a lid opening on hinges. And the child was found in the well. It was held that the plaintiff could not recover.

The Supreme Court of Wisconsin have held that the law will not presume negligence from the mere fact that a person injured in passing over a defective highway had frequently passed over it and knew of its condition. *Kavanaugh v. Janesville*, 24 Wis. 618. See *Maguire v. Middlesex R. Co.*, 115 Mass. 239.

This presumption of negligence from the mere happening of an accident—where *res ipsa loquitur*—often arises in injuries sustained by railway, steamboat, and stage-coach companies. In *Stokes v. Saltonstall*, 13 Peters, 181, s. c. below, Taney, 11, a leading case in this country, it was held that in an action against the proprietor of a stage-coach, the fact that the stage was upset and the plaintiff injured was sufficient to raise a presumption of negligence or want of skill in the driver, and to shift upon the defendant the burden of proving that the driver was in every respect

qualified, and acted with reasonable skill and with the utmost caution.

This doctrine had previously been laid down by Mansfield, C. J., in *Christie v. Griggs*, 2 Campb. 79.

As to injuries occurring from steamboats, an act of Congress, affirming what seems to be the common law, declares that in all suits and actions against proprietors of steamboats, for injuries arising to persons or property from the bursting of the boiler of any steamboat, the fact of such bursting shall be taken as *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment. 5 U. S. Stat. at Large, 306. See *McMahon v. Davidson*, 12 Minn., 357, 371. But the above are cases of contract, and they need not be further considered.

In *Ellis v. Portsmouth & Roanoke R. Co.*, 2 Ired. 198, the plaintiff sued the defendants for having negligently caused the burning of his fence, standing along the line of their railroad; and the Supreme Court held that when the plaintiff shows damage resulting from the defendants' act, which act, with the exercise of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, such as can only be repelled by proof of care or of some extraordinary accident, which renders care useless. And the same court repeated this rule in *Herring v. Wilmington & Ral. R. Co.*, 10 Ired. 402. (As to what is sufficient evidence to connect the defendants with the plaintiff's loss in the case of a building burned down near a railroad track, see *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218.)

The presumption as to the extent of the charge over articles on the occupant's

premises is also treated as a narrow one, at least in England. Thus, in *Higgs v. Maynard*, 12 Jur. n. s. 705, it appeared that the defendant was possessed of a workshop, the windows of which overlooked a yard in which the plaintiff was at work for another. A ladder in the defendant's workshop (a coffee-roasting establishment) fell through one of the windows, and the fragments of the glass in falling injured the plaintiff's eye. It was held that the plaintiff could not recover without proving that the ladder was under the control of the defendant.

So, too, Cockburn, C. J., has observed, in a case already cited (*Welfare v. London & Brighton Railway Co.*, Law R. 4 Q. B. 693), that the court will not presume that a man engaged in repairing the roof of a building in a great city is in the employ of the owner of the building, for it is a matter of general knowledge that repairs in such cases are undertaken by builders or contractors. (Railway companies are, of course, liable for injuries caused by the negligence of contractors after the work of the contractor has been accepted. See *post*.)

In the Superior Court of New York City a different rule has been maintained. It has there been decided that the fall of a piece of wood from a building in New York belonging to the defendant, though at the time the building was undergoing alterations, is sufficient to raise a presumption of liability against the owner. The court thought that the principle was that when an injury was caused by the negligence of some person unknown, and such injury was inflicted through the instrumentality of property owned by the defendant, such ownership was alone sufficient, *prima facie*, to charge such owner with

negligence. *Clare v. National City Bank*, 1 Sweeny, 539.

It has also been held in New York, in an action for death caused by a runaway team, that as the ownership of personal property draws to it the possession, it will be assumed that a person in charge of a horse and wagon of which the defendant is owner is in the service of the defendant; and this, too, though the supposed servant was at the time of the accident engaged in a business which appeared to be that of another person. *Norris v. Kohler*, 41 N. Y. 42. See *Svenson v. Atlantic Steamship Co.*, 57 N. Y. 108.

But of course the horse must have been under the control of the owner or of his servant; otherwise, whether he be let for hire or gratuitously, and but for a short time, the owner will not be liable. *Herlighy v. Smith*, 116 Mass. 265.

The Roman law contained some interesting provisions upon this subject, which still prevail in France, being in some respects like our own law, in others going beyond it. Domat, stating the Roman and French law, says that he who inhabits a house, whether he be the proprietor of it, tenant, or other, is liable for the damage which is caused by any thing thrown out or poured out of any place of the said house, whether by day or by night; and this, too, whether he himself threw it out, or any of his family or domestics, though in his absence and without his knowledge.

This rule was not in application limited to streets, squares, and other public places, but extended to all places where the act occurred. If a man was killed or wounded, the person who did the act was liable to a criminal prosecution, and the master of the house to a fine. If several persons inhabited the same place whence any thing had been thrown or poured out, all were liable, unless it could be known who had done the act. And if the master (owner or chief tenant) of the house occupied only a small part of it and let chambers, or lodged friends in some of them, he was answerable for the act of the person whom he received into his house. But if it should appear out of what room the thing had been thrown, the action might be brought either against the person who was lodging in the room, or against him who had the whole house; and the last would then have recourse against the other. If any thing were hung out from a building whence the fall of it might do injury, he was liable to the public, and, if damage were done, to a further penalty to the person hurt. If tiles fell from a house which was in good condition, the fall being caused by a storm, the proprietor or tenant was not liable. But if the roof was in a bad condition, he who was bound to keep it in repair might be liable to make good the damage that had happened, according to circumstances. Domat, liv. 2, tit. 8, § 1 (Cushing's ed.).

THOMAS et ux. v. WINCHESTER.

(6 N. Y. 397. Court of Appeals, July, 1852.)

Mistake in Label of Drug. The defendant, by the negligence of his agent, sold a quantity of belladonna, a poisonous drug, put up and labelled as extract of dandelion, a harmless medicine, to A., a druggist, who again so sold it to F., another druggist, who so sold it to the *feme* plaintiff, to whom it was administered as dandelion. *Held*, that the defendant was liable for the injury thereby caused.

THE case is stated in the opinion of the court.

Charles P. Kirkland, for appellant, defendant below. *N. Hill, Jr.*, for respondents.

RUGGLES, C. J., delivered the opinion of the court. This is an action brought to recover damages from the defendant for negligently putting up, labelling, and selling as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff, Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, &c.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison County, where the plaintiffs reside.

A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was belladonna, and not dandelion. The jar from which it was taken was labelled " $\frac{1}{2}$ lb. dandelion, prepared by A. Gilbert, No. 108 John Street, N. Y. Jar, 8 oz." It was sold for and believed by Dr. Foord to be the extract of dandelion as labelled. Dr. Foord purchased the article as the extract of dan-

delion from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John Street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others were labelled alike. Both were labelled, like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labelled in Gilbert's name because he had previously been engaged in the same business on his own account at No. 108 John Street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell, and taste, but may, on careful examination, be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester, and used in his business with his knowledge and assent.

The defendant's counsel moved for a nonsuit on the following grounds:—

1. That the action could not be sustained, as the defendant was the remote vendor of the article in question, and there was no connection, transaction, or privity between him and the plaintiffs, or either of them.
2. That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord.
3. That the plaintiffs were liable to and chargeable with the negligence of Aspinwall and Foord, and therefore could not maintain this action.
4. That, according to the testimony, Foord was chargeable with negligence, and that the plaintiffs therefore could not sustain this suit against the defendant; if they could sustain a suit at all, it would be against Foord only.
5. That this suit, being brought for the benefit of the wife, and

alleging her as the meritorious cause of action, cannot be sustained.

6. That there was not sufficient evidence of negligence in the defendant to go to the jury.

The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge, among other things, charged the jury that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending as and for dandelion the extract taken by Mrs. Thomas, or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant, and sold by him to Aspinwall, and by Aspinwall to Foord; that if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment, or expense to the husband; and that the recovery should be confined to the actual damages suffered by the wife.

The action was properly brought in the name of the husband and wife for the personal injury and suffering of the wife, and the case was left to the jury with the proper directions on that point. (1 Chitty on Pleadings, 62, ed. of 1828.)

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If, in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who, in consequence of the gross negligence of A. in building the wagon, is overturned and injured, D. cannot recover damages against A., the builder. A.'s obliga-

tion to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of *Winterbottom v. Wright*, 10 Mees. & Welsb. 109, was decided. A. contracted with the postmaster-general to provide a coach to convey the mail-bags along a certain line of road, and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C. could not maintain an action against A. for the injury thus sustained. The reason of the decision is best stated by Baron Rolfe. A.'s duty to keep the coach in good condition was a duty to the postmaster-general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.

Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labelled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. 2 R. S. 662, § 19. A chemist

who negligently sells laudanum in a phial labelled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter. *Terrymond's Case*, 1 Lewin's Crown Cases, 169. "So highly does the law value human life, that it admits of no justification wherever life has been lost and the carelessness or negligence of one person has contributed to the death of another. *Regina v. Swindall*, 2 Car. & Kir. 232, 233. And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. 2 Car. & Kir. 368, 371. Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer, but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labelled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabelled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart, who leaves them unattended in the street, is liable for any damage which may result from his negligence. *Lynch v. Nurdin*, 1 Ad. & Ellis, n. s. 29;

Illidge v. Goodwin, 5 Car. & Payne, 190. The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. 5 Maule & Sel. 198. The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle, if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label.

In *Longmeid v. Holliday*, 6 L. & Eq. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion, and to have been "prepared" by his agent, Gilbert. The word "prepared" on the label must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label, would have been an open question in an action by the plaintiffs against him; and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defence,

that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion, and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge, in submitting to the jury the question in relation to the negligence of Foord and Aspinwall, cannot be complained of by the defendant.

GARDINER, J., concurred in affirming the judgment, on the ground that selling the belladonna without a label indicating that it was poison, was declared a misdemeanor by statute (2 R. S. 694, § 23), but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

Judgment affirmed.

Causation.—There is no difficulty with those cases in which the chain of causation runs back through a series of (albeit human) machines. The law permits, or rather requires, that the chain should be traced back to him who set in motion the dangerous element. This has been settled ever since *Scott v. Shepherd*, 3 Wils. 403, was decided. This was the case of the lighted squib thrown by the defendant into the market-house on fair-day, which A., B., and C. had caught up convulsively, as it were, from their booths and thrown out, until at last it struck the plaintiff in the eye. The question at issue was whether trespass or case was the proper form of action; but no doubt was entertained, even by the dissenting judge (Mr. Justice Blackstone), that case was maintainable against the defendant. The language of Chief Justice De Grey is often cited. "The throwing the squib by the defendant," said he, "was an unlawful act at common law; the squib had a natural power and tendency to do mischief indiscriminately, but what mischief, or where it would fall, none could know. The fault *egreditur e persona* of him who threw the squib. It would naturally produce a defence to be made by every person in danger of being hurt thereby; and no line can be drawn as to the mischief likely to happen to any person in such danger. The two persons, Willis and Ryall, did not act with, or in combination with, the defendant, and their removal of the squib for fear of danger to themselves seems to me to be a continuation of the first act of the defendant until the explosion of the squib. No man contracts guilt in defending himself; the second and third man were not guilty of any trespass, but all the injury was done by the first act of the defendant. . . . I conceive all the facts of throwing the squib must be considered as *one single act*; namely, the act of the defendant; the same as if it had been a cracker made with gunpowder which had bounded and rebounded again and again before it had struck out the plaintiff's eye." It follows, of course, that none of the intermediate persons could be liable.

Except in a single instance, this case has always been accepted as authority. In *Fitzsimmons v. Inglis*, 5 Taunt. 534, 538, a case for which *Scott v. Shepherd* could afford little analogy, the reporter states that "the court slighted the authority of this case,"—whether merely as to the form of the action or further does not appear.

In *Vandenburgh v. Truax*, 4 Denio, 464, the plaintiff sued the defendant for the loss of a quantity of wine. It appeared that the defendant, having a quarrel with a boy in the street, chased him with a pickaxe into the plaintiff's store; and the boy, in endeavoring to keep out of the reach of his pursuer, ran against and knocked out the fawcett from a cask of wine, by means of which the loss complained of occurred. It was held that the plaintiff could recover.

So, in *McDonald v. Snelling*, 14 Allen, 290, where by the defendant's negligence his horse ran into another's sleigh and frightened the horses, causing them to run into the plaintiff's sleigh, it was held that the defendant was liable. "It is clear from numerous authorities," said the court, "that the mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or of human beings does not necessarily make the result so remote that no action can be maintained."

The plaintiff himself may have become paralyzed with fright or fear, or have been caused to make a sudden and, as it were, involuntary start, which threw him against the calamitous agent; but, if this was merely the effect of the action of the defendant, the connection between the damage which ensued and the defendant, who caused the fright

or start, remains unbroken. Thus, in *Coulter v. American Express Co.*, 6 Lans. 67, the plaintiff brought an action for damages sustained by jumping against the wall of a building. The evidence was that she was alarmed by the driving of the driver in charge of the defendant's express wagon, which he had driven upon the sidewalk behind and near her, and sprang suddenly aside and was injured by striking her face against the wall of the building. She was allowed to recover damages, on the ground that she had not been guilty of negligence. The action of the driver was therefore the cause of the injury. The case was reversed in the Court of Appeals, but not upon this point. 56 N. Y. 585. We have here the key to the doctrine of contributory negligence; but that subject remains to be presented hereafter.

See further, as to intervening agencies of the kind represented by *Scott v. Shepherd*, *Guille v. Swan*, 19 Johns. 381; *Fairbanks v. Kerr*, 70 Penn. St. 86; *Wharton, Negligence*, §§ 93, 94.

The principal case, *Thomas v. Winchester*, is two steps removed from *Scott v. Shepherd*. 1. The intermediate persons between the plaintiff and defendant were not machines, but acted freely and deliberately, on their own account, in disposing of the poison. 2. The plaintiff had to bring his action through the midst of contracting parties. We propose to consider each of these facts at some length.

It is true that in *Thomas v. Winchester* the poison passed through the hands of several persons, acting freely, as principals, and without excitement or hurry; but that is not enough to break the connection between the plaintiff and the defendant. Had negligence been found against Mr. Aspinwall, the

chain of causation must have been broken between the plaintiff and the defendant. It could not then have been shown that the same result would have certainly happened had he not been negligent. If he had not been guilty of negligence, the fact of the mistake might have been discovered before any evil consequences had ensued. And if it could not be said that the result would have inevitably occurred by reason of the defendant's negligence, it could not be found that it *had* so occurred. The plaintiff, therefore, could not make out his case.¹

This is the ground upon which *Carter v. Towne*, 103 Mass. 507, was decided. Gunpowder had been sold to a boy eight years old, who had taken it home and put it into a cupboard where it lay for more than a week, with the knowledge of his parents, or, in their absence, of an aunt who had charge of him. His mother gave him some of the powder, which he fired off with her knowledge; and this was done a second time, when the boy was injured by the explosion. An action was now brought on his behalf against the seller of the powder; and the defendant was held not liable. Though he had been negligent in selling the powder to the boy, the connection of that negligence with the injury had been broken by the negligence of the boy's parents and aunt. Had they not been negligent, the accident might not have happened. The

plaintiff could not prove what was incumbent upon him; to wit, that the damage was *caused* by the defendant. See s. c. 98 Mass. 567.

In *Powell v. Deveney*, 3 Cush. 300, the defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the street, after which a third truckman tried to drive his truck between the two others. In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk and cause them to strike the plaintiff and injure her. It was held that the defendant was liable.

So, too, in the case of a dangerous article shipped through a carrier who has no notice of the dangerous character of the thing, the former is liable to one who is injured by the article (without his own fault), because in such case there has been no intervening fault to break the chain of connection; but it is otherwise if the carrier have notice of the character of the article, for "he who negligently meddles with a dangerous agency is liable for the damage." Wharton, *Negligence*, § 90. The carrier, on being informed of the nature of the package or article, should decline to receive it; otherwise, upon a principle analogous to that of *Fletcher v. Rylands*, *ante*, p. 492, he will be liable.

¹ Such antecedents are sometimes spoken of as the remote cause, in distinction from the nearer ones as the proximate cause; but, in truth, as we have seen, the former is no cause at all. There is but one cause in the case supposed, and that is the intermediate negligence of A. And, generally, the terms "proximate" and "remote," when applied to causation, are as wrong as they are here. With this caution, we quote a very just observation from the opinion of the learned Mr. Justice Miller, in *Insurance Co. v. Tweed*, 7 Wall. 44, 52 "One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

If the intermediate parties, however, be free from fault, it cannot matter, upon the doctrine of the principal case, how many hands the article may have passed through; the shipper will be liable. *Farrant v. Barnes*, 11 Com. B. N. S. 553. See *George v. Skivington*, Law R. 5 Ex. 1; *Wellington v. Downer Oil Co.*, 104 Mass. 64.

If the action be in fact or in substance *ex contractu*, or, more accurately, if a contractual relation exist between the plaintiff and the defendant, it will not affect the question of the latter's liability that the negligence of a third person intervened and produced the damage; for the defendant is bound by his contract. Thus, in *Eaton v. Boston & L. R. Co.*, 11 Allen, 500, in which the plaintiff sued the defendants as carriers of passengers for injuries sustained, the defence was that the injuries were caused by another train running into that in which the plaintiff was riding, and by other intervening negligent agencies, over which the defendants had no control; but the court properly decided that this was no defence. "At the time of the injury complained of," said Colt, J., "the relation of passenger and carrier existed by contract between the plaintiff and the defendants; they had received the plaintiff upon their cars, and were bound to the exercise of all that care and caution which the relation imposes. . . . And it is no answer to an action by a passenger against a carrier that the negligence or trespass of a third party contributed to the injury. These propositions would be more manifest if this action had been brought in form upon the implied undertaking of the defendants; but the plaintiff may elect to sue in tort or contract, and the rule of duty is the same in either form of action."

That is, the plaintiff having a right to sue in contract in such case, in which form of action the intermediate negligence would have been no defence, it cannot be set up in bar of the right to damages, though the plaintiff have sued in tort.

A recent English case affords another example of the same kind. The defendants were under contract to supply the plaintiffs with a proper gas-pipe. Gas escaped from a defect in this pipe, and the servant of a third person negligently took a lighted candle into the room from whence the escape proceeded, and the result was an explosion, causing damage to the plaintiff's stock and premises. It was held in the Court of Exchequer, and afterwards in the Exchequer Chamber, that the plaintiff was entitled to recover for the damage sustained. *Burrows v. March Gas Co.*, Law R. 5 Ex. 67; s. c. Law R. 7 Ex. 96. Two of the judges in the former court rested the liability of the defendants on the ground of joint negligence between them and the third person; but the third, Martin, B., rested it correctly on the ground of contract; and upon this ground the judgment was affirmed on the appeal. Cockburn, C. J., who delivered the opinion of the Exchequer Chamber, said: "The action is not for negligence in its ordinary sense, but for the breach of a contract whereby the defendants promised to supply the plaintiff with a proper and sufficient service-pipe from their mains to a gas-meter within his premises; and the question is, whether there has been a breach of this contract. There can be no doubt that there has been a breach."

This is the true and only ground upon which the case can be sustained, unless our discussion of causation is radically wrong. Had the negligence

of the defendants and the third person been concurrent, instead of successive, then they would have been liable, irrespective of the existence of a contract; they would have been liable to strangers, upon the principle that co-tortfeasors are each and all liable for the common tort. But, with all respect to the two learned judges in the *Exchequer*, the negligence was not joint, but successive; and in such cases we apprehend that the true question is (not whether the defendant's conduct afforded the means for the intervening party to do the act which resulted in the injury, but), whether the plaintiff can prove that the defendant's conduct caused the damage. This he cannot do, for reasons already stated, if there was intervening fault which resulted in the calamity. See *Lannen v. Albany Gas Co.*, 44 N. Y. 459, a similar case to the above, except that the explosion was caused 'by the defendants' servant. *Allison v. Western R. Co.*, 64 N. Car. 382.

There are other cases, however, which are inconsistent with the above view; but we think they cannot be sustained. Thus, in *Illidge v. Goodwin*, 5 Car. & P. 190, it appeared that the owner of a horse had negligently left him standing before his cart in the street, when a passer-by struck the animal and caused him to back into the plaintiff's window; and it was held at *nisi prius* that the owner of the horse was liable. Now, if by this it is meant that every owner of a horse is liable for damage committed by him through the misconduct of a stranger, simply because he, the owner, has left his horse unguarded, the case is not law. But it may have been that the evidence showed that the horse had attempted to bite the passer-by; and, if

so, the jury or court may not have thought the man to blame for retaliating.

In order to break the connection, the intervening act must in fine have been so far from the natural and usual result of the defendant's negligence as either to show clearly that the defendant's act or omission did not cause the damage, or to raise a presumption that it did not.

It is true, the intervention of any agency prevents the plaintiff from being able to prove that the defendant caused the act. *Thomas v. Winchester* is itself an example; and so is *Scott v. Shepherd*. Had it not been for the act of the intermediate parties, the plaintiff probably would not have suffered injury. The doctrine of causation may not, therefore, hold absolutely good. But the law seeks fault and responsibility; its object being reparation. And, as in the one case the intermediate agent only accomplished the general purpose of the defendant, — the sale of the drug, — and in the other only the natural and inevitable sequence of the act, the law properly considers the first party as still acting down to the happening of the calamity. The intermediate parties in either case were but vehicles for the transmission of the dangerous article. In any other view, supposing the intermediate persons to act independently of the purpose or nature of the first party, the latter could not be liable. The law cannot hold the first party liable if the second acts contrary to his obvious purpose or the nature of his act. See *Davidson v. Nichols*, 11 Allen, 514, where a harmless chemical preparation became explosive only by mixture with another substance; and this being a use which was not intended, the defendant

was held not liable for the damage so caused.

So, too, the rise of a whirlwind, or an unexpected storm, or other act which may be embraced under the term *vis major*, may intervene between the negligence of the defendant and the damage; and as such things do not happen as the natural sequence of the defendant's act or omission, he cannot be liable. See a learned consideration of this and kindred points in Wharton, *Negligence*, §§ 114-130.

Breaches of Contract. — But in *Thomas v. Winchester*, the plaintiff sued one of the parties to a contract in which he had no interest, in respect of a wrong (the negligent labelling and vending of the drug) which was also a breach of this contract. It is true, the circumstances of the case were such that the court was able to distinguish it from those English cases in which it has been held that none but the parties to a contract can sue for its breach. The court, in *Thomas v. Winchester*, say that the sale of belladonna as dandelion would naturally and almost inevitably result in injury; while it is not generally the natural and necessary consequence of the breach of a contract to injure third persons.

Although this is an obvious ground of distinction, we apprehend that it was not necessary to take it. We doubt if the English courts would accept it. In *Collis v. Selden*, *infra*, the damage was as natural and probable as that in *Thomas v. Winchester*. The English doctrine proceeds upon the broad ground that the damage in such cases arises from the breach of a contract, and that third persons, having no interest in the contract, can have no rights growing out of its breach.

The subject first came under the no-

tice of the English courts in the well-known case of *Langridge v. Levy*, 2 Mees. & W. 619; s. c. 4 Mees. & W. 337. The plaintiff recovered, though not a contracting party with the defendant; but the ground of the decision was, that the defendant knew that the dangerous article (a gun) was to be used by the plaintiff.

In the next case, no such fact appeared, and the right of action was denied. *Winterbottom v. Wright*, 10 Mees. & W. 109, the case referred to in *Thomas v. Winchester*, of the action by the stage-driver against the contractor for the supply of mail-coaches. Lord Abinger and Alderson, B., 'give no reason for the decision, except that to allow the action would be to extend the right to limitless persons, — a not very satisfactory reason. Rolfe, B., said that the plaintiff's declaration alleged the duty as *growing out of the contract* with the Postmaster-General. How the case would have struck him had a general duty, regardless of contract, been alleged, does not appear.

These cases have recently been followed by two others. *Collis v. Selden*, Law R. 3 Com. P. 495, and *Playford v. United Kingdom Tel. Co.*, Law R. 4 Q. B. 706; s. c. 10 Best & S. 759. In the former, the plaintiff sued for injuries resulting from the fall of a chandelier in a public-house. The declaration alleged that defendant wrongfully, negligently, and improperly hung a chandelier in the public-house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier, unless properly hung, was likely to fall upon and injure them; and that, the plaintiff being lawfully in the public-house, the chandelier fell upon and injured him. To this there was a demurrer, which

was sustained. It was held that, notwithstanding the form of the declaration, the case fell within the principle of *Winterbottom v. Wright*, *supra*. It was conceded, however, that if there had been an allegation that the defendant *knew* that the chandelier was improperly hung, the action might have been maintained. The case would then have come within *Langridge v. Levy*. See *Longmeid v. Holliday*, 6 Ex. 766; *George v. Skivington*, Law R. 5 Ex. 1; also the form of the declaration in *Wellington v. Downer Oil Co.*, 104 Mass. 64. Byles, J., said that negligence alone was not enough; it must be shown that there was some breach of duty. As to that, it did not appear what capacity the defendant filled, or who and what the plaintiff was, whether a guest or bare licensee.¹

Playford v. United Kingdom Tel. Co., *supra*, was an action for negligence by the person to whom a message had been erroneously transmitted by the defendants. The court held that the action could not be maintained, on the ground that the obligation of a telegraph company to use due care and skill in the transmission of messages arose entirely out of contract; that the defendants' charter had not affected the relation of the company to the sender or the receiver of a despatch; and that, the contract having been made with the sender of the message, the plaintiff had no right of action. These are the chief English cases upon the point.

With all respect for the English courts, we apprehend that it is a mistake to suppose that the plaintiff's cause of action is necessarily the breach of a contract. The fact that a contract existed, and was broken at the same time and by the same act or omission by

which the plaintiff's cause of action arose, is only one of the accidents of the situation. The defendant owed, in respect of the same thing, two distinct duties: one of a special character to the party with whom he contracted, and one of a general character to others. The latter, it must be conceded, had an existence before the contract was entered into. A carriage-maker allows the plaintiff to try a carriage, with a view to effecting a sale; and, owing to negligence in its construction, the carriage breaks down and injures the plaintiff. This is a good cause of action; and yet there was no contract. A clerk in a drug-store goes to a phial labelled with a drug used for curing the toothache, and, applying some of the contents to his tooth, becomes badly poisoned; the manufacturer having wrongly labelled the phial. Has not the clerk (his employer not being at fault) as good a cause of action against the manufacturer as if he had bought the drug of him? The duty, therefore, does not grow out of the contract, but exists before and independently of it. The fact might be shown by many cases. See, for instance, the class of cases in which a passenger without hire has been held entitled to recover of a carrier for damage sustained by reason of negligence. *Nolton v. Western R. Corp.*, 15 N. Y. 444; *Derby v. Reading R. Co.*, 14 How. 468; or those in which a party is liable for the negligent performance of an agreement made without consideration. *Gill v. Middleton*, 105 Mass. 477.

What, then, becomes of this duty when the contract of sale is consummated with the intermediate party? How is it possible that an obligation due to third persons can be discharged without their consent, by the mere

¹ But *quære*, if that could be material in an action not against the landlord?

formation of a new obligation of a different character with a particular person? What does it mean when it is said that even this contractee may sue in *tort* or in contract for his damages? Certainly nothing, unless that the original duty which the defendant, before the contract, owed to all alike still survives, even towards his contractee; and, if the original duty is not merged towards the contractee by the contract, it would be strange if it could be merged towards strangers. The breach of duty declared upon, therefore, after the contract, is the very same breach of duty (or may be, if the plaintiff declares properly) for which he would have declared had no contract intervened.

The original and more extensive duty cannot be lost in the subsequent limited duty. A man may part with his rights, but he cannot cancel his liabilities without the consent of those to whom they are due. And we speak advisedly when we call duties of the wider class obligations and liabilities. Men are bound to perform duties arising *dehors* contract as fully as they are those arising from express agreement. In the foreign law the former duties are always described as obligations. And if they are as binding as contracts, it is not easy to see how they can be discharged by the mere act of the party who owes them.

A man does not diminish his duties to the world by entering into a contract with one or two persons. Rather, by imposing a new duty upon the rest of the world, — that of refraining from interfering with the performance and success of his contract, — he generates a new duty, in addition to the original obligation, — the duty of so performing that contract as not to unnecessarily interfere with the affairs of others.

Suppose a servant were sent by his master to a shop to buy a carriage, and that in riding home with the purchase the carriage should break down from a defect in its construction, and that the servant should be so badly injured as to have to suffer the amputation of an arm. Now, he could not maintain an action against his master, and his master could only recover the price paid for the carriage and the loss of the injured man's services. Can it be that the English law denies a remedy to the unfortunate man against the negligent carriage-maker? He would clearly have a right of action, as we have seen, if he were only *trying* the carriage.

Compare the right of action by a servant against a railway company for injuries sustained while travelling on their line, though the servant himself paid no fare; the only contract being made with the master. *Marshall v. York, &c., Ry. Co.*, 11 Com. B. 655. And see *Austin v. Great Western Ry. Co.*, Law R. 2 Q. B. 442. In the first case cited, Jervjs, C. J., said: "Upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any *contract* between him and the company, but by reason of a *duty implied by law* to carry him safely."

Austin v. Great Western Ry. Co., *supra*, was the case of an injury by a carrier of passengers to a young child carried in its mother's arms, for which she had paid no fare, though the child was "over age;" and the action was sustained. Several of the judges attempted to sustain the decision on the ground of contract; but Mr. Justice Blackburn took the true ground, that of a violation of a general duty. Referring to the doctrine of *Marshall v. York, &c., Ry. Co.*, *supra*, as correct,

he said: "It was there laid down that the right which a passenger by railway has to be carried safely, *does not depend on his having made a contract*, but that the fact of his being a passenger casts a duty on the company to carry him safely."

Nor has the doctrine of *Winterbottom v. Wright*, when pressed upon the court, been fully accepted even in England. In *Dalyell v. Tyrer, El., B. & E. 899*, A. had let to B. his steam ferry, with its master and crew, and C., a passenger for hire paid to B., had been injured by a breach of A.'s contract with B., to wit, by the mismanagement of A.'s crew; and C. was held entitled to maintain an action against A., the owner of the ferry. In the course of the argument for the defendants, counsel objected that the cause of action was tort founded upon contract; to which Erle, J., replied, "But, in case of misfeasance, is not the person immediately guilty of it liable, at all events, as well as the contracting party?" And again, in reply to the argument that the plaintiff, not having paid fare to the defendants, was not a passenger for hire, the same judge said, "If *Hetherington [B., ut supra]* pays the defendants for the use of the ship to carry the plaintiff, and they do so carry him, are they not retained for hire and reward to carry the plaintiff? Suppose A., at B.'s request, pays a surgeon to attend B., and the surgeon maltreats B., is not the surgeon liable at the suit of B.?"

Finally, in overruling the motion for a new trial, Mr. Justice Erle said: "I take it to be shown by the evidence that the plaintiff had made a contract with *Hetherington* to be conveyed across the ferry; and, for the purpose of being so conveyed, went on board the vessel hired, with its crew, for that

purpose by *Hetherington* from the defendants, and while on board suffered injury from the negligence of the crew. The question is, are the defendants liable for that negligence? They were, by their crew, in possession of the vessel; and I am of opinion that if the negligence in question had injured a mere stranger, not on board, but standing, for instance, on the pier at the time, they would have been liable. That is established by *Quarman v. Bennett, 6 Mees. & W. 499*, and *Fenton v. Dublin Steam Packet Co., 8 Ad. & E. 835*. Then, can the plaintiff lose a right of action which he would have had as a stranger merely because he was a passenger for hire paid to *Hetherington*, and not to the defendants? He clearly loses no right of action against them, though he may possibly acquire an additional right against *Hetherington*. *Pippin v. Sheppard, 11 Price, 400*; *Gladwell v. Steggall, 5 Bing. N. C. 733*; and *Marshall v. York, Newcastle & B. Ry. Co., 11 Com. B. 655*, decide that the question whether there was an actual retainer of the defendants by the plaintiff for hire does not affect their liability for negligence of this character."

But even upon the view that no previous general duty exists, and assuming that the only duty cast upon the defendant grows out of a contract with a third person, it is difficult to understand why he may not owe a duty to the plaintiff to perform that contract properly, as well as to the third person. The plaintiff, it is true, unlike the co-contractor, could not maintain an action for a breach of such duty unless he should sustain damage thereby; but, if he has suffered injury, what reason exists why he should not be indemnified? The plaintiff can require the

defendant so to perform his duties to the other party to the contract as not to injure him (the plaintiff), in case of a fulfilment of the contract, on the principle *sic utere tuo etc.*; then why not in a case where the defendant has added to this injury an injury to another person?

The reason generally urged against allowing an action to one not a party to the contract is, that it subjects the first party at fault to an endless liability. See *Winterbottom v. Wright*, 10 Mees. & W. 109; *Davidson v. Nichols*, 11 Allen, 514. Thus, it is said that the builder of a railway carriage should be liable, in case of an accident which happened through a defect in the construction of the carriage, to each passenger who sustained an injury thereby. *Davidson v. Nichols*, *supra*. But this is true in many cases, whether the right of action under consideration be given or not. The owner of a boiler is often liable to all who may be injured by an explosion which occurs through a defect in its making; and upon a recovery by them, he may bring an action against his vendor for the breach of the latter's contract, and recover the sum which he was compelled to pay to the first suitors. And so on back to the manufacturer.

In many cases, however, it is difficult to trace the defect back to the manufacturer; and the difficulty increases with time and use. The consequence is, that the action will generally be brought against the owner, or, if the owner be himself the sufferer and plaintiff, against his vendor on the warranty. The evils supposed to be in the train of the principle are imaginary.

The article used must, of course, be used for the purpose for which it was intended, or the manufacturer or owner will not be liable; for the plaintiff could

not show that injury would certainly have happened in the proper use of the article; and the connection is broken by his or another's fault. *Comp. Davidson v. Nichols*, 11 Allen, 514. And this is probably all that the allegation that defendant knew the nature of the article, and intended the use made of it—as in *Wellington v. Downer Oil Co.*, 104 Mass. 67—means. But we think that so long as the article is used as the manufacturer intended, he should be liable for any negligence which the plaintiff can prove him or his servants guilty of in its construction; though the alleged breach of duty involved also a breach of contract with some one else. The plaintiff has suffered an injury, for which the defendant was at fault; and we think we have shown that this fault involved a breach of duty to the plaintiff.

Of course, for a total failure to perform the contract, a third person could not maintain an action; the duty arises only when performance is undertaken. In other words, there must be a *misfeasance*. See the telegraph cases to be presently considered.

The American authorities have not generally fallen into this difficulty. It is true that the doctrine of *Winterbottom v. Wright* is recognized in the principal case; and there are other cases of which the same may be said. *Loop v. Litchfield*, 42 N. Y. 351; *Albany v. Cunliff*, 2 Comst. 165; *Coughtry v. Globe Woollen Co.*, 56 N. Y. 124, *infra*; *Loose v. Clute*, 51 N. Y. 494. See also *Davidson v. Nichols*, 11 Allen, 514, 517. But, aside from some of the New York cases, it will generally be found that this was unnecessary, and that there has been little direct following of that case in this country.

In *Coughtry v. Globe Woollen Co.*, 56 N. Y. 124, the Court of Appeals of New York, while expressing approval of the English rule, have, we apprehend, departed from it. In that case, certain contractors for making a cornice for the defendant agreed to put up any staging necessary for the work; and this was done. But owing to defective construction, the staging fell, and killed the plaintiff's intestate, a workman on the scaffold in the employ of the contractors. It was held that the defendant was liable; the ground taken being that the deceased was killed by an erection on the defendant's premises, put there for the accommodation of the workmen. *Winterbottom v. Wright* was distinguished on the ground that the defendant did not own or run the coach, that it was not in his possession or control, and that he did not invite any one to enter it. And as to *Losee v. Clute*, 51 N. Y. 494, *supra*, where a boiler exploded in the hands of a vendee, and injured the plaintiff, who was held to have no right of action against the manufacturer, it was said that the defective article had been sold and delivered to the purchaser; and he had no longer any control over it.

But no such ground as this is taken in the English cases; and it is difficult to understand it. If the injury occurs by reason of the defendant's default, what matters it that he had not control over the thing at the time? The change of control is nothing, unless the original defect has been increased thereby, so that it cannot be proved that the original negligence of the defendant caused the damage. The very fact that the defendant is liable to the party having control of the thing, when this control was

even gratuitously obtained (*Gill v. Middleton*, 105 Mass. 477), shows that the liability for the original negligence survives the change of control.

The whole difficulty consists in proving that the original defect was the cause of the action. But that is a question of fact; if the plaintiff cannot prove it, he cannot maintain his action.

The decision in *Coughtry v. Globe Woollen Co.* was right; but the case would have been more satisfactory had the court denied the soundness of the English rule, instead of drawing a distinction equally unsound. The decision itself, as we understand it, is opposed to the doctrine of the English courts.

The English rule has been virtually rejected by the Court of Appeals of Kentucky in a recent case. *United Society of Shakers v. Underwood*, 9 Bush, 609. This was an action brought against the directors of an insolvent bank to recover damages for the wrongful appropriation by officers of the bank of a special deposit; the plaintiffs alleging that the defendants were guilty of negligence in the performance of their duties as guardians of the bank.¹ It was objected that there was no privity of contract between the plaintiffs and the defendants; that the only privity was between the defendants and the bank. But the objection was overruled, and the defendants held liable. It is true, the court base their decision partly upon an implied contract; but by this nothing more appears to have been meant than that general duty (arising independently of the actual contract set up in defence) of which we have spoken. The directors, say the learned court, "invite the public to deal with the corporation; and when

¹ See *Bank Directors and Bank Officers* in note to *Fisher v. Thirkell*, *post*.

any one accepts their invitation, he has the right to expect reasonable diligence and good faith at their hands; and, if they fail in either, they violate a duty they owe not only to the stockholders, but to the creditors and patrons of the corporation. *Hodges v. New England Screw Co.*, 1 R. I. 312. An honest administration of the affairs of the bank, and slight diligence, at least, in preventing special deposits from being wrongfully converted to its use, were legal duties which these directors were under obligations to the special depositors to perform; and as these grew out of their implied contract that they would perform such duties, there is a legal privity between the parties. This doctrine was recognized by this court in the case of the *Lexington and Ohio R. Co. v. Bridges*, 7 B. Mon. 556, in which case it was held that the directors of that corporation, by accepting their positions, assumed the discharge of certain duties not only to the company, but to persons dealing with it; and that if they misappropriated the funds intrusted to their control, and a creditor was damaged by the act, he had a right of action against them from the injury resulting from their illegal conduct." See to the same effect *Salmon v. Richardson*, 30 Conn. 360.

In *Hodges v. New England Screw Co.*, *supra*, the Supreme Court of Rhode Island, upon a bill in equity against the directors of a corporation by a stockholder, alleging a violation of their charter in taking stock in another company, said: "In considering the question of the personal responsibility of the directors, we shall assume that they violated the charter of the Screw Company. The question then will be, Was such violation the result of mistake as to their powers; and, if so,

did they fall into this mistake from want of proper care, — such care as a man of ordinary prudence practices in his own affairs? For if the mistake be such as, with proper care, might have been avoided, they ought to be liable. If, on the other hand, the mistake be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the Screw Company, they ought not to be liable." See also *Koehler v. Iron Co.*, 2 Black, 715; *Conant v. Seneca Bank*, 1 Ohio St. 310.

There is another class of cases in which the English doctrine has found no place in this country; namely, actions by persons to whom a telegraphic despatch has, by negligence of the telegraph company, been erroneously transmitted. Our courts have uniformly held the action maintainable, notwithstanding the fact that the contract of transmission was made with another. See the cases to be presently cited. There has been, however, much diversity in respect of the ground upon which these decisions have been based; and of this presently. But first, as to the question of liability to the non-contracting party for *non-delivery* of a telegram.

This question does not appear to have met with a decision in the courts, though the language of some of the cases upon other points, and particularly that of the *New York & Washington Tel. Co. v. Dryburg*, 35 Penn. St. 298, possibly implies that an action for the non-delivery of a message might be held not to be confined to the sender. The action in the case referred to was brought by the receiver of a despatch for a mistake in transmission; and it was sustained, one of the grounds being that the defendants were the agents of the plaintiff, by reason of

being servants of the public. It is clear, however, that in this the court are not to be considered as using the term "agent" in any exact legal sense, for none of the elements of an agency are here present. What was meant was doubtless this: that, being created for the convenience and benefit of the public, they owe peculiar duties to the same, — duties *resembling*, to use the illustration of the court, those of common carriers.

An analogy to such cases has often been suggested, though not perhaps for the purpose of showing a liability on the part of the telegraph company for non-delivery.

It will not be difficult to show that there is no proper analogy between the two cases. It may be doubted if, in the absence of statute, a telegraph company would be bound even to transmit messages for everybody. It is not clear that the doctrine concerning common carriers would prevail. The carrier's liability for refusing to receive and transmit goods was, at common law, alleged to arise from the ancient custom of the realm. *Jackson v. Rogers*, 2 Show. 327; *Else v. Gatward*, 5 T. R. 143, 150, Ashhurst, J. But the case is much stronger against the person to whom a despatch is addressed. The ground of the carrier's liability for a failure to deliver does not exist in the case of a telegraph company. The sender of a despatch puts no property into the hands of the company, and there is, therefore, no opportunity for theft, or occasion for collusion.

Nor does it follow by the fact that telegraph companies hold themselves out to the world as undertaking to transmit and deliver messages faithfully, that they render themselves liable to those to whom messages are

addressed for a breach of their duty of delivery. Their situation may be compared to that of a private messenger. It is clear that such a person, while undertaking for but a few people, is under no liability to parties to whom messages are sent for a failure to deliver; and can the case be different if the messenger should hold himself out to all persons as engaged in the business of carrying despatches? The mere fact that he has taken upon himself a wider duty as to the number of persons for whom he will act in transmitting messages cannot generate a duty as to those to whom they are directed.

Now, the only difference between such a case and that of the telegraph company is this: that the latter are incorporated; that they employ a servant at each end of the line for the transmission and reception of the message; and that the message is sent with great celerity by means of electricity; but these facts cannot be important.

Let us now turn to the statutes and see if any liability has been imposed by the legislature upon telegraph companies in this respect.

The English telegraph act provides that "the use of any telegraph and apparatus erected or formed under the provisions of this act for the purpose of receiving and sending messages shall . . . be open for the sending and receiving of messages by all persons alike, without favor or preference." See *Playford v. United Kingdom Tel. Co.*, Law R. 4 Q. B. 707, note. In *Playford v. United Kingdom Tel. Co.*, just cited, it was held, in an action by the receiver of an erroneous message, that this act had not affected the relation of companies to those to whom despatches are transmitted. The telegraph act of 1868 contains no provision on this point; and

the same is true of the later acts. 25 & 26 Vict. c. 131, § 61; 31 & 32 Vict. c. 110; 32 & 33 Vict. c. 73, § 23.

The Massachusetts act provides that "every company shall receive despatches from and for other telegraph lines, companies, and associations, and from and for any person; and on payment of the usual charges . . . shall transmit the same faithfully and impartially." And for every wilful neglect the company are declared liable to a penalty of one hundred dollars to the "person, association, or company *sending or desiring to send the despatch.*" Gen. Sta. c. 64, § 10.

The statutes of New York (2 Rev. Sta. 740, § 11, 5th ed.), Michigan (1 Comp. Laws, 1871, c. 80, § 14), Missouri (1 Wagn. Sts. 324, § 10), and Maryland (1 Code, p. 171, § 117), contain provisions and prescribe penalties substantially the same as those in this act.

The statute of Pennsylvania simply requires the companies to transmit despatches offered, under a penalty for refusal, with no provision for faithful performance. Bright. Purd. p. 951, § 1.

In Maine, it is provided that "for any error or unnecessary delay in writing out, transmitting, or delivering a despatch . . . making it less valuable to the person interested therein," the company "shall be liable for the whole amount paid on such despatch; and they shall transmit all despatches in the order they are received, under a penalty of one hundred dollars, to be recovered with cost by the person whose despatch is wilfully postponed." Rev. Sts. c. 53, § 1.

Many of the States are without statutory provisions on this particular point; and no act has been found giving a right of action to the person to whom the message is sent, either for non-delivery

or for error in transmission, excepting that of Maine above quoted. It must be conceded that in that State the receiver of the message, if he be "the person interested therein," has a right of action to the amount paid for transmission. But this would perhaps cover no more than the case of a despatch transmitted by the plaintiff's agent; and, if so, it possibly abridges rather than enlarges the liability of the telegraph company. For, apart from such a provision, the company must be liable for the actual loss to the plaintiff, where the sender acts as agent in the premises. But this discussion is not predicated of such cases.

The other question — whether the receiver of a message can sue the telegraph company for an error in transmission, and upon what ground — is not so free from difficulty. In this country there is great unanimity in holding the companies liable. *New York & Washington Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Bowen v. Lake Erie Tel. Co.*, 1 Am. Law Reg. 686; *De Rutte v. New York, Albany, &c., Tel. Co.*, 1 Daly, 547; *Rose v. United States Tel. Co.*, 3 Abb. Pr. n. s. 408; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Ellis v. Am. Tel. Co.*, 13 Allen, 226. In England, as we have seen, the contrary is held. *Playford v. United Kingdom Tel. Co.*, Law R. 4 Q. B. 706; 10 B. & S. 759.

In the *New York & Washington Tel. Co. v. Dryburg*, generally cited as the leading American case, one LeRoy transmitted to the plaintiff, by the defendants' line of telegraph, an order for a number of "hand bouquets." The operator, reading "hund" for "hand," supposed that the word had been abbreviated for "hundred," and transmitted the message accordingly. The

plaintiff acted upon the message as delivered, and, upon learning of the mistake, brought an action against the telegraph company to recover for the loss incurred. The action, as has been stated, was sustained, two grounds being given: first, that, being servants of the public, the defendants were to be regarded as agents of the plaintiff as well as of LeRoy, the sender of the despatch; secondly, that, being agents of LeRoy at all events, they were liable to third persons for their misfeasances, and that the alteration of the message by the operator, though made in good faith as it appears, was an act of that character, imputable to the company. "If the handwriting," say the court further, "was so bad that he [the operator] could not read it correctly, he should not have undertaken to transmit it; but, the business of transmission assumed, it was very plainly his duty to send what was written."

In *Bowen v. Lake Erie Tel. Co.*, 1 Am. Law Reg. 685, a similar case at *nisi prius*, the court charged the jury that telegraph companies, holding themselves out to transmit despatches correctly, are under obligation to do so, unless prevented by causes over which they have no control.

In *De Rutte v. New York, Albany, &c., Tel. Co.*, 1 Daly, 547, in the Common Pleas of New York city, the plaintiff's agent in Bordeaux prepared a telegram and sent it in a letter to a house in New York, with instructions to send it in the quickest manner to the plaintiff at San Francisco. The New York house gave the message to the defendants, and paid the full cost of transmission to California. On reaching its destination, the message contained several errors, some of which were apparent, but one of which misled

the plaintiff, and caused the loss for which the suit was brought. The court held that the case was not changed by reason of the fact that the despatch passed over several lines, and that it was not proof of negligence on the part of the plaintiff that he had acted upon the despatch (while knowing that it contained errors) without having it repeated; and the plaintiff was allowed to recover. One objection taken by the defendants was this: that they had entered into no contract with the plaintiff concerning the message. But the court replied that it did not necessarily follow that the contract was made with the person sending the message. He might have no interest in the subject-matter of it. The party to whom it is addressed may be the only one interested in its correct transmission; and when that is the case, he is the one with whom in reality the contract is made. It was further said, that the case was somewhat analogous to that of a loss of goods by a carrier, as to which the rule of law is, that the right of action against the carrier is in the consignee. But the defendants were also liable, the court held, regardless of this matter of contract, on the ground that they had put the plaintiff to a loss by their negligence.

Opposed to these American cases stands the case of *Playford v. United Kingdom Tel. Co.*, Law R. 4 Q. B. 706, 10 B. & S. 759, in the Queen's Bench of England. The court there held an action not maintainable by the receiver of an unrepeatable message, on the ground that the obligation of the company to use due care and skill in the transmission of messages arises entirely out of contract; and that the contract having been made with the sender of the message, the plaintiff had no right of action

against the company. This point has been sufficiently considered already.

It may not be difficult to find objection to the leading ground of the company's liability taken in *De Rutte v. New York, Albany, &c., Tel. Co.*; that the contract for the proper transmission of the message being in reality for the benefit of the receiver, he had a right of action for the admitted breach. The reply to this position is to be found in the rule established in the very important case of the *Exchange Bank v. Rice*, 107 Mass. 37. "The general rule of law," says Mr. Justice Gray, in delivering the judgment of the court, "is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter." The court herein overrule certain unguarded expressions in *Carnegie v. Morrison*, 2 Met. 381, and in *Brewer v. Dyer*, 7 Cush. 337, and bring the law back to a more secure anchorage. Nor does *De Rutte v. New York, Albany, &c., Tel. Co.* come within any of the exceptions to this rule, unless (upon the supposition that the transmission of a message is, or is analogous to, a bailment of goods, as has sometimes been supposed: *Scott & Jarnagin, Telegraphs*, §§ 95, 97; *Parks v. Alta Californian Tel. Co.*, 13 Cal. 422; *Leonard v. New York, Albany, &c., Tel. Co.*, 41 N. Y. 544; *True v. International Tel. Co.*, 60 Maine, 9) it is embraced within the first and most important exception. This includes cases where the defendant, receiving money or property from another, which in equity and good conscience belongs to the plain-

tiff, promises the party from whom he receives it to account for it to the plaintiff. Now, any supposed analogy between such a case and that of the receipt of a telegraphic message, with a promise to deliver to the plaintiff, as has often been pointed out (see *Western Union Tel. Co. v. Carew*, 15 Mich. 525, 533; *Playford v. United Kingdom Tel. Co.*, Law R. 4 Q. B. 706, 710; *Breese v. United States Tel. Co.*, 48 N. Y. 132), will not bear examination. It is doubtful even if a letter to be delivered under similar circumstances would come within the exception; for a letter can hardly be considered as property, and the tendency of the courts is to narrow, and not to extend, the rule on this point. But, however this may be, it is almost useless to say that a telegraphic company does not undertake to transmit, physically, the piece of paper received, or to account for it as property; the agreement is simply to use due care and skill to translate the writing into telegraphy, to send the proper symbols over the line, and then to retranslate and deliver the message. This is any thing but a receipt of money or property upon a promise to pay it to the plaintiff.

The above case would, however, be correct where the sender of the message were in fact only the agent of the plaintiff.

In the *New York & Washington Tel. Co. v. Dryburg*, the Supreme Court, as has been observed, took the position that the company were to be regarded as the agents of the sender of the message; and they were held liable as such, on the ground that they had been guilty of a misfeasance.

Before proceeding to consider the real nature of the relation of the telegraph company to the sender of a mes-

sage, another point should be noticed. In most, if not all, of the cases to which we have referred, the telegraph company had limited their liability for mistakes (above the sum paid for the message) to cases in which the despatch had been repeated by the receiver. Such a limitation was held reasonable in *Ellis v. American Tel. Co.*, 13 Allen, 226. (So in *Breese v. United States Tel. Co.*, 48 N. Y. 132. But see *True v. International Tel. Co.*, 60 Maine, 9, holding such a limitation bad in the absence of a requirement that the despatch should be repeated in order to make the company liable for mistakes). And it was remarked by the learned Chief Justice that the right of the receiver of an un-repeated message could not, at best, rise higher than that of the sender. If this be true, the question we are now considering is of little importance; for it is probable that the blanks of all the companies contain such stipulations. But is this a sound proposition of law? Is the measure of damages of a third person, injured by the breach of a contract, to be limited to the amount recoverable by the other party to the contract? for this seems to be the force of the objection. The interest of the parties to the contract may be very small; while the injury to the third person may be very great. If the third person have a right of action at all, the value of the contract can be of no importance. Suppose the contract were without consideration, could it be contended that, since the parties could maintain no action for a breach of it, a third person, injured by its improper performance, could not? B. allows A. to pasture his cattle, *gratis*, in his meadow. Through the misconduct of B., the cattle break through the fence into C.'s corn-field, and are chased out

and injured. Cannot C. maintain an action against B. for any damage to his crop? And if A. should pay for the privilege of pasture, would B.'s liability be measured by the sum recoverable by A. for the injury to his cattle? The crop may have been ruined, while the cattle were but slightly hurt.

The recent cases of *Henkel v. Pape*, Law R. 6 Ex. 7, and *Verdin v. Robertson*, 10 Ct. Sess. Cas. (3d series) 35, have decided that under the English Telegraph Act of 1868 telegraph companies cannot be considered as the agents of the sender of an *erroneous* message. In *Henkel v. Pape*, Kelly, C. B., said: "The post-office authorities are only agents to transmit messages in the terms in which the senders deliver them. They have no authority to do more." The act above referred to, as has been intimated, did not change in any way the relation of the companies to the senders or the receivers of messages; it simply provided for the purchase and management of the various lines by the post-office department. It would seem, therefore, that the cases cited are authorities in this country; and an examination of the doctrine of agency leads to the same conclusion.

The ground upon which the act of an agent binds his principal (in the absence of express appointment or ratification) is this: that the principal has held the agent out to the party dealing with him as having authority to bind him, either in the particular transaction, or in the class of transactions to which it belongs. If in point of fact it appear that the party dealing with the agent as such was not authorized by the supposed principal so to treat him, the latter will not be bound. The dealing, in such case, is with the supposed

agent alone; and it is not material that the agent may have represented that he was acting in the matter for another. But such a misrepresentation would render him liable to the injured party; not, of course, as an agent, but in his individual capacity as a principal.

To apply these propositions to the case of the telegraph company, it would be a violent presumption to say that, by leaving a message with them for transmission, the sender holds them out as authorized to deliver any message which they in good faith may send over their lines. The situation is quite different from that of a recognized case of agency. It might well be doubted even whether the mere employment of a private messenger, not a servant, to convey a message (this being confessedly his only connection with the sender) could be regarded as authorizing him to deliver any different word from that given, however upright his intentions. But the case of the telegraph company is much stronger. Here is a body of men authorized by statute to transact for the public a business of peculiar character, but little understood by other men; they have asked for and accepted a charter requiring them to perform their duties with care and skill; and they thereby proclaim themselves able and willing to do so.

There is clearly, then, more truth in the view that the telegraph company hold themselves out as principals, than in the notion that the simple act of handing them a message for transmission constitutes them the party's agents. In a certain broad sense they may be considered as agents of the sender; in the same sense that the bullet is the agent of the assassin. But this, we submit, is not the legal idea of the

term. An agent in the English law we conceive to be, like the *procurator* in the Roman law (see Goudsmit on Roman Law, p. 178, note), one who acts with some discretion, or at least purpose, to bind another. Now the telegraph company acts with neither of these in sending despatches; with no discretion, for they undertake with the sender to transmit the precise message given them, at all events (barring disturbances beyond their control), regardless of consequences; with no purpose to bind the sender, since this implies knowledge of the immediate object to be effected, and the exercise of volition towards its accomplishment.

If this is correct, it may follow that the telegraph company are not to be regarded as agents of the sender, even when the message is correctly transmitted; and we shall not shrink from such an inference. It is worthy of doubt if the courts do not often use the term "agent" merely as a short cut through a supposed difficulty in connecting persons with each other. The post-office authorities, for instance, are often said to be the agents of the receiver of a letter; but this is only to overcome the difficulty found in the fact that when a letter is once deposited in the post-office it is (except by the courtesy of the authorities) placed beyond the control of the sender. And it is suggested, with deference, that it would be better to say so than to invent a fiction, as useless and misleading as it is false.

But, at all events, the most that can be said is that the sender of a telegraphic message gives the company authority to send a despatch; and, if there is any further representation, that the supposed sender of the same authorized the transmission of the very despatch

delivered, such representation must be considered to be made as well by the company as by the sender; and, if false, the telegraph company, upon the doctrine of implied warranty of authority, are liable to the receiver. *Collen v. Wright*, 8 El. & B. 647, in Exch. Ch. See *ante*, p. 22.

It is clear that the telegraph company cannot be considered as the servants of the sender of a message. Not to insist upon the notion that the relation of master and servant implies a power of appointment in the former, and that telegraph companies, being created by the legislature alone, for the public, cannot be made the servants of an individual, it will scarcely be doubted that it is essential to the relation that the master should have complete control for the time over the servant. It was doubtless upon this principle that *De Forrest v. Wright*, 2 Mich. 368, and all that class of cases, have been decided. In the case mentioned (which is cited with special approval in *Hilliard v. Richardson*, *post*, p. 636), the plaintiff brought an action for an injury caused by a public licensed drayman while unloading goods for the defendant; the drayman being in his employ at the time. It was held that the action should have been brought against the latter; and the court, upon a review of the authorities, said that the rule was this: that where the person employed is in the exercise of an independent and distinct employment, and not under the

immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence of the former.¹

The conclusion, then, at which we arrive is, that in the transmission of messages telegraph companies act as principals; and their liability for negligent mistakes (and perhaps delays) arises either on the ground of a misrepresentation of agency, or on the broad principle that a person must so conduct his business as not to injure others. The telegraph company, since they can insist on non-interference in the performance of their contract, are bound in the performance reciprocally to refrain from action which would have a natural tendency to produce a particular injury to those upon whom they have imposed a duty. Now the telegraph is resorted to only in cases of importance and urgency, so that the very fact of presenting a message for transmission indicates that it concerns a matter of importance. The company cannot, therefore, fail to know that a mistake in transmission will be likely to produce damage to the receiver, by causing him to do that which otherwise he would not do. Knowing, then, the probably evil consequences of transmitting an erroneous message, they owe a duty to the receiver of refraining from such an act; and if (by negligence) they violate this duty, they must, on plain legal principles, be liable for the damage produced.

¹ Pothier, also says: "Non-seulement la personne qui a commis le délit ou quasi-délit est obligée à la réparation du tort qu'elle a causé; celles qui ont sous leur puissance cette personne, telles que sont les pères, mères, tuteurs, précepteurs, sont tenues de cette obligation, lorsque le délit ou quasi-délit a été commis en leur présence, et généralement lorsque pouvant l'empêcher, elles ne l'ont pas fait. Mais si elles n'ont pu l'empêcher, elles n'en sont point tenues." Obligations, § 121.

AARON FISHER *et al.* v. ISABELLE F. THIRKELL.

(21 Mich. 1. Supreme Court, Michigan, July Term, 1870.)

Excavations under public streets. Who liable. — Excavations, properly and safely constructed under the public streets in cities, for the convenience of the owners of premises adjoining, are not unlawful; and they are not liable to be treated as nuisances if kept in repair, and the use of the street is not interrupted for an unreasonable length of time.

A party will not be liable for an injury occasioned by a nuisance, on the ground of his possession of the premises where the nuisance is shown to exist, unless his possession be such as to give him the legal control of the premises.

The owner of premises in possession of a tenant will not be liable for an injury occasioned by the premises becoming, subsequently to the leasing, out of repair, in a case where the obligation to repair is upon the tenant, and not upon the landlord.

ERROR to Wayne Circuit.

This was an action on the case brought in the Circuit Court for the County of Wayne, by Isabelle F. Thirkell against Aaron Fisher, Elam Fisher, John H. Griffith, and William F. Kier, for an injury to the plaintiff occasioned by an opening in the sidewalk in front of premises in the city of Detroit, alleged to be owned by the defendants, Aaron and Elam Fisher, and to be in the occupancy of the defendants Griffith and Kier. The questions to be reviewed arise upon the charge of the circuit judge as to the liability of the several defendants. At the request of the plaintiff, the court charged the jury: 1. If the jury believe, from the evidence, that the defendant Griffith was in the use and occupancy of the premises in question, in whole or in part, at the time of, and some days before the injury occurred, taking an inventory or otherwise using the same for his own benefit, and that the wood was put into the vault for the use of the premises by his direction or authority, in whole or in part, in such use of his said premises, said Griffith is liable in this case.

2. If the jury believe, from the evidence, that the Fishers constructed the building, scuttle, and improvements, and that from their construction several years ago down to the time when the injury occurred, they continued to be and were the owners of such scuttle and improvements, they are liable in this action, although they may have been only lessees of the ground on which

such scuttle and improvements were situated, and may have subleased the same to other parties ; that they were bound to keep the scuttle in good and safe condition while they thus owned the building and improvements, and it makes no difference that they may not have known that such scuttle was not in good and safe condition at the time.

To this charge the defendants excepted.

The defendants requested the court to charge :—

1. That the mere parol bargain between Mrs. Hill and Griffith for the sale of the stock of goods, and the transfer of the lease thereof, did not make a valid binding contract until there was either a part payment for said goods and lease, or a written contract of sale between the parties thereto, or a delivery of said goods, or a portion thereof.

2. That there is no evidence tending to prove that, previous to the time when the injury happened, there had been either such part payment, or written contract, or such delivery.

3. That even if, under the instructions of the court, the jury should find that Griffith had actually gone into possession, yet he could not be liable in this action for negligence unless he knew of a defect in the scuttle, or had been in possession such a period of time that his want of knowledge would be negligence.

4. That it was not the duty of the Messrs. Fisher, as owners of the building in question, to keep the same in repair while it was occupied by tenants, unless there were an agreement made with the tenants that they (the Fishers) should make the repairs.

5. In the absence of any such agreement, the defendants Fisher are not liable in this action for injuries to the plaintiff caused by want of repair of the scuttle, which was broken or put out of order during the possession of tenants.

6. That there is no evidence tending to show that the scuttle was out of repair when the premises were leased by defendants Fisher, or that the defendants Fisher have since been in the actual occupation of said premises, and for this reason the defendants Fisher cannot be held liable in this action.

7. That the Fishers had a perfect right, in erecting their store, to excavate under the sidewalk, if they put the same in a perfectly secure and unobstructed condition ; and if the accident to the plaintiff occurred by reason of the negligence of the Fishers'

tenants in permitting the scuttle to get out of repair, and not by reason of any original defect in the manner of making the same, then the Fishers are not liable in this action.

The circuit judge charged as requested in the first request made by defendant's counsel, but refused to charge as requested in the remaining requests. To which the defendants excepted.

The jury returned a verdict for the plaintiff against the said defendants, Aaron Fisher, Elam Fisher, and John H. Griffith, who bring the judgment entered thereon into this court, by writ of error.

C. I. Walker, for plaintiffs in error. *Levi Bishop*, for defendant in error.

CHRISTIANCY, J. This was an action on the case brought by the defendant in error, against the plaintiffs in error, to recover damages received by her by falling into a scuttle or hole in the sidewalk, on Woodward Avenue, Detroit, in front of a store in what is known as Fishers' Block, of which said Fishers were the owners, and which they had erected some years before. The scuttle opened into a vault beneath the sidewalk (as usual in such cases), connecting with the cellar, and was constructed and used for putting wood and coal into the cellar for the use of the store. It was constructed by the owners in the usual manner, by putting in an iron ring or thimble through the stone sidewalk, and fitting into this an iron cover, coming up even with the surface of the walk, and forming part of it. Some time prior to this accident, the thimble had been broken by throwing wood against it, which loosened the cap or cover in such a manner that by stepping on the side of it, it would turn down; and in this way the plaintiff received the injury, about dusk on the evening of the 28th December, 1868.

The premises were not in the occupation of the Fishers, the owners, and never had been occupied by them, having always been occupied by tenants under them. And, some time previous to the accident, this store had been leased to a Mr. and Mrs. Hill, or one of them (it does not definitely appear whether the lease was to Hill or wife, or both, though the wife seems to have owned the stock), and was occupied by them as a drug store, under the lease, up to about the time of, if not after, the accident, which is one of the questions in the case.

On the 16th day of December, 1868, the defendant John H.

Griffith entered into a verbal negotiation or arrangement with Hill and wife for the purchase of the stock at cost, and for the purchase of the lease and fixtures. The inventory of the stock was completed on the 26th, having been made by Hill and wife and Griffith, and persons employed by them, one of them, Kier, having been employed by Griffith, but paid out of the drawer from sales made prior to the completion of the sale to Griffith; and during the time of making the inventory all the parties had, of course, access to the store, but the key was kept by Hill, he opening the store in the morning and locking it at night. After the inventory of the stock was completed, delays occurred, in reference to the fixtures, and in reference to the title of a lot in Detroit, which the brother of Griffith was to mortgage to secure a part of the purchase-money, a search and abstract of which had to be made, and there were consequent delays in executing the bond and mortgage and the bill of sale of the stock. And on the 26th, Hill, seeming to apprehend that the proper securities might not be given, and the sale not be completed, appointed Kier (who had been aiding in taking the inventory), to take charge of the key and the money in the store, till the matter of the sale should be finally decided. It seems some goods had been sold from time to time after being placed on the inventory, and these sales still continued, with the apparent understanding that if the sale to Griffith should be completed, the money would be his in place of the goods sold, otherwise it would belong to Hill.

On the evening of the 28th, about half-past five, or between that and six o'clock (which the evidence tends to show was after, — though but a little after the accident), the papers having been examined by Cleaveland Hunt, an attorney in his office, were delivered, and the money and securities handed over, — except the bill of sale of the goods, to be yet executed by Mrs. Hill, who was not present with her husband at the attorney's office. The bill of sale was executed afterwards, that evening or the next morning, and received by Griffith in the morning. Up to the time of the delivery of the other papers at the attorney's office, no money or other consideration had been paid by Griffith, and there had been no delivery of the goods or any part of them, nor of the key. And there is no evidence in the record tending to show that Griffith had any possession or control of the premises otherwise than being there by the mere permission of the Hills,

as already stated, making the inventory and settling the preliminaries of the purchase.

But after the payment and the delivery of the papers, which took place at the attorney's office, Griffith, about six o'clock in the evening, and some time after the accident, came to the store and assumed the possession, though he did not receive the bill of sale of the goods till the next morning.

There was no evidence in the case tending in the least degree to controvert any of the facts above stated, as to the time of the completion of the purchase, or the time when Griffith became entitled to, or took the possession, unless the admission made by him to Wilkins, after the accident, can be construed as such.

Understanding that Wilkins was concerned on the part of the plaintiff in her claim against him for damages, and that he was acting in her behalf, Griffith, in the course of a conversation with Wilkins (as testified by the latter), said, among other things, that there was a question as to his liability, owing to the fact that neither party had possession of the premises at the time; that they were about transferring the title or lease; that the papers were nearly made out; that they had been executed; and the attorney of the opposite party wished to see them again for the purpose of examining them again, to see if they needed correction, and they had been passed across the table for the attorney of the opposite party to see whether they needed correction, and that about that time the accident must have happened: and for this reason he did not know who was liable. Being further examined Wilkins says, "He said he was in actual possession, but doubted whether he was in the legal possession for the reason stated;" and on cross-examination he further says that Griffith said "there was a question of his liability; that he had not assumed possession."

Now we think it clear that all Griffith states here in regard to being in possession refers to the facts, as stated in all the testimony of witnesses who speak to those facts, and about which there is not the shadow of discrepancy; and, if he did say he was in actual possession, it was accompanied with such qualifications as clearly show that it was, in law, neither an actual nor a legal possession; that, in other words, he was mistaken in his legal opinion of what constituted possession. About the facts there was no dispute and no discrepancy.

But no kind of possession by him which did not give him the control of the premises, as between him and the Hills, could have rendered him responsible for this accident; as no other could impose upon him, instead of them, the duty of keeping the scuttle in repair. And there was not only no evidence tending to show he had such possession at the time of the accident; but the tendency of all the testimony upon this point was to show that he had yet obtained no such possession, and that the Hills still retained the possession and control; that though he was in the store a part of the time, he was there only by the permission of the Hills, and whatever he or his servants did there was only by their permission.

The plaintiff has doubtless suffered an injury for which she ought to be compensated. But Griffith, so far as appears by the evidence, was as guiltless of all wrong, legally and morally, as the plaintiff herself. And it would be no less a violation of morals or of law to compel him to make good the damages than to leave her to bear them herself. She has no more right, upon any legal or equitable principle, to call upon him than she would have to call upon any customer who might have stepped into the store to purchase a box of pills. The court, therefore, erred in submitting the question of Griffith's possession, or his liability, to the jury. There was no evidence tending to establish either.

We will next inquire whether there was any evidence tending to establish the liability of the Fishers, as owners, who made the excavation and put in the scuttle.

The evidence tended to show that it was in good and safe condition when made, and continued so when leased to the Hills, and there was no evidence of an opposite tendency. It does not appear that there was any provision in the lease, or any agreement of the lessor, to keep the premises in repair.

The court, at the plaintiff's request, charged, substantially, that if the jury should find from the evidence that the Fishers constructed the building, scuttle, and improvements, and that from their construction, several years ago, down to the time when the injury occurred, they continued to be and were the owners, they are liable in this action, though they had leased the same to other parties, — that they were bound to keep the scuttle in good and safe condition while they owned the building and improvements; and it makes no difference that they may not have known that the scuttle was unsafe.

And the court refused to charge as requested by the defendants, —

“ 1. That it was not the duty of the Messrs. Fisher, as owners of the building in question, to keep the same in repair while it was occupied by tenants, unless there was an agreement made with the tenants that they (the Fishers) should make the repairs; and that, in the absence of such agreement, they are not liable for the injury complained of, caused by a want of repair, while in the possession of their tenants.

“ 2. That there is no evidence tending to show that the scuttle was out of repair when the premises were leased; and

“ 3. That the Fishers had a perfect right, in erecting their store, to excavate under the sidewalk, if they put the same in a perfectly secure and unobstructed condition; and if the accident to the plaintiff occurred by reason of the negligence of their tenants in permitting the scuttle to get out of repair, and not by reason of any original defect in the manner of making the same, then the Fishers are not liable in this action.”

We think the court erred both in charging as requested by the plaintiff below, and in refusing to charge as requested by the defendants.

There are some cases in the State of New York which apparently sanction this ruling of the court, and would hold the owners who made the excavation and the scuttle, responsible for all injuries resulting from the want of its entire safety, though the owner was guilty of no negligence in the manner of its construction; thus making the owner an absolute insurer against all injuries which may arise from it, without reference to his negligence or vigilance. *Congreve v. Morgan et al.*, 5 Duer, 495, and same case on appeal, 18 N. Y. 79; and this though the work was well and safely constructed, and was afterwards destroyed or injured by the act of a wrongdoer. *Congreve v. Morgan*, 18 N. Y. 84; and see *Davenport v. Ruckman*, 10 Bosw. 20; and *Irvin v. Fowler*, 5 Robertson R. 482.

But these cases go upon the avowed principle that such excavations in the public street are unlawful in themselves, *ab initio*; and that no person is authorized to make them without affirmative legislative authority (which, however, I infer might be by resolution or ordinance of the common council. *Milhau v. Sharp*, 17 Barb. 435). And if it be conceded that the construction

itself was a wrongful act, and in violation of law, then the consequences which the New York courts have drawn from this fact would seem naturally enough to follow upon common law principles. This is well illustrated by the case of *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767, which turns upon this distinction. And if there had been an ordinance of the city of Detroit against making such constructions without special permission of the council, which had not been obtained, or forbidding their construction except in a certain manner, and such ordinance had been violated in constructing this excavation or the scuttle, perhaps the rule of responsibility, adopted by the courts of New York, might be applicable to the present case. But it is conceded there was no such ordinance of the city of Detroit, applicable to the construction of this work (and that no license or permission was obtained from the city council for its construction); and we are satisfied that, at common law, the making of such excavations under sidewalks in cities, and the scuttles therein, for such purposes as this was made and used for, were not treated as nuisances in themselves, or in any respect illegal, unless the walk was allowed to remain broken up for an unreasonable length of time, or the work was improperly or unsafely constructed; though it would afterwards become a nuisance if not kept in repair. Judging from the reported cases, the usage or custom of constructing such works in cities seems to have been in England, for a long period, as general as we know it has been in this country. And though we find many decided cases in the English books, for private injuries caused by these structures being out of repair, and indictments for obstructing highways and streets in a great variety of ways, we have been cited to no English cases, and have discovered none, in which such works have been held illegal, in themselves, when properly and safely made, without any legislative permission, or that of the municipal authorities. Their legality seems, in all the cases, to have been assumed by the courts without any showing of such special authority or any authority. They have been treated as nuisances when allowed to be out of repair, and private actions have frequently been sustained for injuries received in consequence; but we find no intimation of their original illegality when safely and properly constructed. This will appear from the cases cited below upon the question whether the tenant or the landlord is bound to

keep them in repair. And the same view seems to have been quite generally taken in this country outside of the state of New York.

The principles of the common law applicable to this question are, we think, clearly stated in *Clark v. Fry*, 8 Ohio St. 358, which was an action for damages caused by the plaintiff's falling into an excavation made in the sidewalk (or part of the street) in front of the defendant's lot, in the city of Toledo, communicating with the cellar; and the Supreme Court of Ohio held that the right of transit in the use of the public highways is subject to such incidental, temporary, or partial obstruction, as manifest necessity requires, and that among these are the temporary impediments necessarily occasioned in the building and repairing of houses and lots fronting on the streets of a city, and in the construction of sewers and cellars, &c.; that these are not invasions, but qualifications of the right of transit on the public highway, and the limitation on them is, that they must not be unnecessarily interposed or prolonged; that such temporary obstructions upon the highway, when guarded with due care to prevent danger to the public, and not unnecessarily extended or continued, are not nuisances, and do not require a license from the municipal authority to legalize them; although suitable regulations by city authorities requiring such obstructions to be properly guarded, and to prevent them from being made in an improper manner or continued unnecessarily, are usual and highly proper.

The original erection having been legal, and in a proper and safe condition when the Fishers leased the premises to the Hills, and the injury being received in consequence of the scuttle getting out of repair during the tenancy, were the Fishers liable, as owners or otherwise, for having failed to keep it in safe condition and repair? The lease, so far as appears, being silent as to who should make repairs, it was the duty of the lessees to keep the premises in repair. *Gott v. Gaudy*, 22 Eng. L. & Eq. 173; *Leavitt v. Fletcher*, 10 Allen, 121; *Elliott v. Aiken*, 45 N. H. 86; *Estep v. Estep*, 28 Ind. 114; *City of Lowell v. Spaulding*, 4 Cush. 277.

And the owners, being out of possession and not bound to repair, are not liable in this action for injuries received in consequence of the neglect to repair. See *Payne v. Rogers*, 2 H. Bl. 850,* a case much like the present, except that it appeared the landlord was to make the repairs; and on this ground alone he

was held liable to the plaintiff, to avoid circuitry of action. And see, as to the last point, *City of Lowell v. Spaulding*, above cited; *Chauntler v. Robinson*, 4 Exch. 163, that owner, as such, out of possession, not bound to repair; *Rich v. Basterfield*, 4 M., G. & S. 788; *Russell v. Shenton*, 3 Ad. & E. (N. S.) 449; *Bishop v. Bedford Charity*, 1 E. & E. 697, — injury from falling through grating, — all the judges agree as to this point, though divided as to the evidence; *Cheetham v. Hampson*, 4 T. R. 318, — owner not bound to repair fences when premises leased to tenant. See also *Regina v. Watts*, 1 Salk. 357.

The same rule seems clearly settled in Pennsylvania. *Offerman v. Starr*, 2 Penn. St. 394; and *Bears v. Ambler*, 9 Penn. St. 193. The latter is a case like the present in all its material circumstances. Suit against owner, held not liable, premises having been leased in good order. And in Massachusetts, *City of Lowell v. Spaulding*, cited above; and in Maryland, *Oromys v. Jones*, 9 Md. 108, a very instructive and well-considered case for an injury caused by falling through a vault under sidewalk.

But, if the scuttle had been out of repair and unsafe when leased to the Hills, the Fishers might, perhaps, have been held liable. *Rich v. Basterfield*, above cited, and *Todd v. Flight*, 9 C. B. (N. S.) 377.

There may be good sense and sound policy in the rule adopted in New York, making owner, constructing such works, liable as insurers against all injuries which may arise from them, irrespective of the question of negligence. But we do not think it is the sense or the policy of the common law.

The judgment must be reversed with costs, and a new trial awarded.

The other justices concurred.

WILLIAM HILLARD *v.* JOSEPH RICHARDSON.

(8 Gray, 849. Supreme Court, Massachusetts, March Term, 1855.)

Owner and Contractor. — The owner of land, who employs a carpenter for a specific price to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair.

ACTION of tort to recover damages for an injury sustained by the plaintiff while driving upon a highway in the city of Cambridge. Trial before Merrick, J., who reported the case, after a verdict for the plaintiff, for the consideration of the full court.

The evidence tended to prove the following facts: Between the hours of five and six in the afternoon of December 5, 1851, the plaintiff was driving in a wagon, in and through said highway, when the horse suddenly took fright at a pile of boards lying by the side of the way, but within its limits, bolted from his course, and carried the wheel of the wagon violently against a post near the edge of the sidewalk, whereby the plaintiff was thrown violently from the wagon, and seriously injured. The boards were placed there the same afternoon, and not long before the occurrence of the accident, by a teamster, acting under the direction of Lewis Shaw, with the intention of allowing them to remain till the morning of the next day, and then removing them to the land adjoining the highway. This land and the buildings upon it belonged to the defendant, and were in his possession, except so far as they were occupied by Shaw in the execution of a written contract with the defendant, and under license from him. By that contract, Shaw agreed, for a specific price, and before a day named, to alter a certain paper factory into two dwelling-houses, according to a plan and specification annexed to the contract, and to make certain repairs thereon, and to furnish all the requisite materials. The defendant also gave Shaw license to use, while he should be engaged in the execution of the contract, one of the buildings upon the land to shape and finish work for buildings of his own, in which the defendant had no interest. Shaw procured the boards and brought them to the place, chiefly for the purpose of using them in the alteration of the defendant's buildings, under the written contract, and was, at the time of the accident, actually engaged in the execution of that contract.

The presiding judge instructed the jury, among other things, that "the act of laying and leaving the boards in the highway by Shaw must, for the purposes of this action, be deemed the act of the defendant;" and that "as the boards at which it was alleged that the horse took fright were procured by Shaw, to be used, in whole or part, in performance and execution of the written contract between him and the defendant, and were materials necessary therefor, the defendant was responsible for the acts of Shaw, in

placing the boards in the highway, and suffering them to remain there ; and that his liability in relation thereto was in all respects the same as the liability of Shaw."

C. G. Loring, for the defendant. *R. Choate* and *J. W. May*, for the plaintiff.

The decision was made at March term, 1856.

THOMAS, J. The questions raised by the report are upon the instruction given by the presiding judge to the jury. The material question, that upon which the case hangs, is whether, upon the facts reported, the defendant is liable for the acts, and for the negligence and carelessness of Shaw.

In looking upon the case reported, it is to be observed, *First*, That the acts done by Shaw, and which are charged as negligence, were not done by any specific direction, or order, or request of the defendant. *Secondly*, That between the defendant and Shaw the ordinary relation of master and servant did not exist. *Thirdly*, That the acts done, and which are charged as negligence, were not done upon the land of the defendant. They did not consist in the creating or suffering of a nuisance upon his own land, to the injury of another. *Fourthly*, That the boards placed in the highway were not the property of the defendant ; that he had no interest in them, and could exercise no control over them. *Fifthly*, That the defendant did not assume to exercise any control over them. *Sixthly*, That there is no evidence of any purpose on the part of the defendant to injure the plaintiff, or anybody else, or so to use his property, or suffer it to be so used, as to occasion an injury.

Was the defendant liable for the negligent act of Shaw in the use of the highway ? As a matter of reason and justice, if the question were a new one, it would be difficult to see on what solid ground the claim of the plaintiff could rest. But he says that such is the settled law of this Commonwealth, and that the question is now no longer open for discussion. Three cases are especially relied upon by the plaintiff, as settling the rule in Massachusetts. They are *Stone v. Codman*, 15 Pick. 297 ; *Lowell v. Boston and Lowell Railroad*, 23 Pick. 24 ; and *Earle v. Hall*, 2 Met. 353.

Stone v. Codman was this : The defendant employed one Lincoln, a mason, to dig and lay a drain from the defendant's stores, in the city of Boston, to the common sewer. By reason

of the opening made by Lincoln and the laborers in his employment, water was let into the plaintiff's cellar, and his goods were wet. 1. Lincoln procured the materials, and hired the laborers, charging a compensation for his services and disbursements. 2. The acts causing the injury to the plaintiff's goods were done upon the defendant's land, and in the use of it for the defendant's benefit. 3. There was no contract, written or oral, by which the work was to be done for a specific price, or as a job. 4. The case is expressly put upon the ground that between the defendant and Lincoln the relation of master and servant existed. The Chief Justice, in delivering the opinion of the court, said: "Without reviewing the authorities, and taking the general rule of law to be well settled, that a master or principal is responsible to third persons for the negligence of a servant, by which damage has been done, we are of opinion, that, if Lincoln was employed by the defendant to make and lay a drain for him on his own land, and extending thence to the public drain, he (Lincoln) procuring the necessary materials, employing laborers, and charging a compensation for his own services and his disbursements, he must be deemed, in a legal sense, to have been in the service of the defendant, to the effect of rendering his employer responsible for want of skill, or due diligence and care; so that, if the plaintiff sustained damage by reason of such negligence, the defendant was responsible for such damage." The case well stands on the relation of master and servant. The work was under the control of the defendant. He could change, suspend, or terminate it, at his pleasure. Lincoln was upon the land with only an implied license, which the defendant could at any moment revoke. The work was done by Lincoln, not on his own account, but on the defendant's. The defendant was indeed acting throughout by his servants. The injury was done by the escape of water from land of the defendant to that of the plaintiff, which the defendant could have, and was bound to have prevented.

The second case relied upon by the plaintiff is that of *Lowell v. Boston & Lowell Railroad*. 23 Pick. 24. In a previous suit (*Currier v. Lowell*, 16 Pick. 170) the town of Lowell had been compelled to pay damages sustained by Currier by reason of a defect in one of the highways of the town. That defect was caused in the construction of the railroad of the Boston & Lowell Company. It consisted in a deep cut through the highway,

made in the construction of the railroad. Barriers had been placed across the highway, to prevent travellers from falling into the chasm. It became, in the construction of the railroad, necessary to remove the barriers, for the purpose of carrying out stone and rubbish from the deep cut. They were removed by persons in the employ of the corporation, who neglected to replace them. Currier and another person, driving along the highway in the night time, were precipitated into the deep cut, and seriously injured. Currier brought his action against the town of Lowell, and recovered damages. This action was to recover of the railroad corporation the amount the town had been so compelled to pay. The railroad corporation denied their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident took place, because that section of the road had been let out to one Noonan, who had contracted to make the same for a stipulated sum, and had employed the workmen. This defence was not sustained; nor should it have been. The defendants had been authorized by their charter to construct a railroad from Boston to Lowell, four rods wide through the whole length. They were authorized to cross turnpikes or other highways, with power to raise or lower such turnpikes or highways, so that the railroad, if necessary, might pass conveniently over or under the same. St. 1830, c. 4, §§ 1, 11. Now it is plain that it is the corporation that are intrusted by the legislature with the execution of these public works, and that they are bound, in the construction of them, to protect the public against danger. It is equally plain that they cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to the purpose of the railroad, and under authority of the corporation, vested in them by law for the purpose. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; and that servant had the care and supervision of them. The accident occurred from the negligence of a servant of the railroad corporation, acting under their express orders. The case, then, of *Lowell v. Boston & Lowell Railroad* stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say that the fact of Noonan being a contractor for this section did not relieve the

corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant acting under their orders.

The only respect, it seems to us, in which this case aids the doctrine of the plaintiff, is that the learned judge who delivered the opinion of the court cites with approbation the case of *Bush v. Steinman*, 1 Bos. & Pul. 404, as "fully supported by the authorities and by well-established principles." It is sufficient to remark, in passing, that the decision of the case before the court did not involve the correctness of the rule in *Bush v. Steinman*.

The case of *Earle v. Hall*, 2 Met. 353, is the third case cited by the plaintiff, as affirming the doctrine upon which he relies. Hall agreed to sell land to one Gilbert. Gilbert agreed to build a house upon and pay for the land. While the agreement was in force, Gilbert, in preparing to build the house on his own account, by workmen employed by him alone, undermined the wall of the adjoining house of the plaintiff. It was held that Hall was not answerable for the injury, although the title to the land was in him at the time the injury was committed. The general doctrine is stated to be that we are not merely to inquire who is the general owner of the estate, in ascertaining who is responsible for acts done upon it injurious to another; but who has the efficient control, for whose account, at whose expense, under whose orders, is the business carried on, the conduct of which has occasioned the injury. The case of *Bush v. Steinman* is cited as a leading case, "very peculiar, and much discussed;" but we do not perceive that the point it decides is affirmed. The general scope of the reasoning in *Earle v. Hall*, as well as the express point decided, are adverse to it.

These cases neither in the points decided nor the principles which they involve support the rule contended for by the plaintiff.

But the plaintiff says that the well-known case of *Bush v. Steinman* is directly in point, and that that case is still the settled law of Westminster Hall. If so, as authority, it would not conclude us; though, as evidence of the law, it would be entitled to high consideration.

Upon this case of *Bush v. Steinman*, three questions arise:—

1. What does it decide?
2. Does it stand well upon authority

or reason? 3. Has its authority been overthrown or substantially shaken and impaired by subsequent decisions?

1. The case was this: A., having a house by the roadside, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; C. with D. to furnish the materials; the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. Held, that A. was answerable for the damage sustained.

2. At the trial, Chief Justice Eyre was of opinion that the defendant was not answerable for the injury. In giving his opinion at the hearing *in banc*, he says he found great difficulty in stating with accuracy the grounds on which the action was to be supported; the relation of master and servant was not sufficient; the general proposition, that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seemed to be too large and loose. He relied, as authorities, upon three cases only: *Stone v. Cartwright*, 6 T. R. 411; *Lonsdale v. Littledale*, 2 H. Bl. 267; and a case stated upon the recollection of Mr. Justice Buller.

Stone v. Cartwright lays no foundation for the rule in *Bush v. Steinman*. The decision was but negative in its character. It was that no action would lie against a steward, manager, or agent for the damage of those employed by him in the service of his principal. This is the entire point decided. Lord Kenyon said, "I have ever understood that the action must be brought against the hand committing the injury, or against the owner for whom the act was done." The injury complained of was done upon the land of the defendant, and by his servants. It consisted in so negligently working the defendant's mine as to undermine the plaintiff's ground and buildings about it, so that the surface gave way. The mine was in the possession of the defendant; the injury was direct and immediate; the workmen were the servants of the owner.

The case of *Lonsdale v. Littledale*, in its main facts, cannot be distinguished from *Stone v. Cartwright*. It stands upon the same grounds. The defendant's steward employed the under-workmen. They were paid out of the defendant's funds. The machinery and utensils belonged to the defendant, and all the persons employed were his immediate servants.

The third case was but this: a master having employed his

servant to do some act, this servant, out of idleness, employed another to do it; and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable. What was the nature of the act done does not appear. And whether the case was rightly decided or not, it is difficult to see any analogy between it and the case the Lord Chief Justice was considering.

Mr. Justice Heath referred to the action for defamation, brought against Tattersall, who was the proprietor of a newspaper, with sixteen others. The libel was inserted by the person whom the proprietors had employed by contract to collect the news and compose the paper, yet the defendant was held liable. It would seem to be not very material who composed the paper, but who owned and published it.

Mr. Justice Heath also cited, as in point, the case of *Rosewell v. Prior*, 2 Salk. 460, which was an action upon the case for obstructing ancient lights. The defendant had erected upon his land the obstruction complained of. There had been a former recovery for the erection; this suit was for the continuance. The premises of the defendant had been leased. The question was, whether the action would lie for the continuance after his lease. "*Et per cur.* It lies; for he transferred it with the original wrong, and his demise affirms the continuance of it; he hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions."

Mr. Justice Rooke, in addition to the cases of *Stone v. Cartwright* and *Littledale v. Lonsdale*, alluded also to the case of *Michael v. Alestree*, 2 Lev. 172, in which it was held that an action might be maintained against a master for damage done by his servant to the plaintiff in exercising his horse in an improper place, though he was absent, because it should be intended that the master sent the servant to exercise the horses there. See *Parsons v. Winchell*, 5 Cush. 595.

The examination of these cases justifies the remark that *Bush v. Steinman* does not stand well upon the authorities, and is not a recognition of principles before that time settled. The rule it adopts is apparently for the first time announced.

Does it stand well upon the reasoning of the court? We think all the opinions given in it lose sight of these two important dis-

tinctions: in the cases cited and relied upon, the acts done, which were the subjects of complaint, were either acts done by servants or agents, under efficient control of the defendants, or were nuisances created upon the premises of the defendants, to the direct injury of the estate of the plaintiffs. The servant of the lime-burner was not servant of the defendant; over him the defendant had no control whatsoever; to the defendant he was not responsible. There was no nuisance created on the defendant's land. It does not appear that the defendant owned the fee of the highway. The case is put on the ground that the lime was put near the premises of the defendant, and with a view of being carried upon them. The lime was not on the defendant's land; he did not direct it to be put there: he had not the control of the man who put it there.

Mr. Justice Heath said, "I found my opinion on this single point, viz., that all the sub-contracting parties were in the employ of the defendant." This is not so, unless it be true that a man who contracts with a mason to build a house employs the servant of the man who burns the lime.

Mr. Justice Rooke says, "The person, from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." It cannot be meant that one who builds a house is to be responsible for the negligence of every man and his servants who undertake to furnish materials for the same. Such a rule would render him liable for the most remote and inconsequential damages. But the act complained of did not result from the authority of the defendant. The authority under which the servant of the lime-burner acted was that of his master. And neither the lime-burner nor his servant was acting under the authority of the defendant, or subject to his control. The defendant might, with the same reason, have been held liable for the carelessness of the servant who burnt the lime, and of the servant of the man who furnished the coals to burn the lime.

3. Has the doctrine of the case of *Bush v. Steinman* been affirmed in England, or has it been overruled and its authority impaired?

The plaintiff cites the case of *Sly v. Edgely*, at *nisi prius*, 6 Esp. R. 6. The defendant, with others, then owning several houses, the kitchens of which were subject to be overflowed,

employed a bricklayer to sink a large sewer in the street. The bricklayer opened the sewer and left it open, and the plaintiff fell in. It was contended that the bricklayer was not the servant of the defendant. He was employed to do a certain act, and the mode of doing it, which had caused the injury, was certainly his own. Lord Ellenborough is reported as saying, "It is the rule of *respondeat superior*; what the bricklayer did was by the defendant's direction." It does not appear how the bricklayer was employed. If not by independent contract, the case stands very well on the relation of master and servant. A case at *nisi prius*, so imperfectly reported, can have but little weight.

Another case at *nisi prius* was that of *Matthews v. West London Water Works*, 3 Campb. 403,⁶ in which the defendants, contracting with pipe-layers to lay down pipes for the conveyance of water through the streets of the city, were held liable for the negligence of workmen employed by the pipe-layers. The case is very briefly stated, and no reasons given by Lord Ellenborough for his opinion reported. It may stand on the ground that the defendants, having a public duty to discharge, as well as right given, could not delegate this trust, so as to exempt themselves from responsibility. This case is alluded to in *Overton v. Freeman*, 11 C. B. 872, hereafter to be examined, where Maule, J., makes the following remarks concerning it: "That is but a *nisi prius* case; the report is short and unsatisfactory; and the particular circumstances are not detailed."

In *Harris v. Baker*, 4 M. & S. 27, and in *Hall v. Smith*, 2 Bing. 156, it was held that trustees or commissioners, intrusted with the conduct of public works, were not liable for injuries occasioned by the negligence of the workmen employed under their authority. These cases stand upon the ground that an action cannot be maintained against a man, acting gratuitously for the public, for the consequences of acts which he is authorized to do, and which on his part are done with due care and attention. They give no sanction whatever to the doctrine of *Rush v. Steinman*.

In *Randleson v. Murray*, 8 Ad. & El. 109, a warehouseman in Liverpool employed a master porter to remove a barrel from his warehouse. Through negligence of his men the tackle failed, and the barrel fell and injured the plaintiff. Held, that the warehouseman was liable. The case is put distinctly on the relation of master and servant. Lord Denman said, "Had the jury been

asked whether the porters whose negligence occasioned the accident were the servants of the defendant, there can be no doubt they would have found in the affirmative." The injury occurred also in the direct use of the defendant's estate.

In *Burgess v. Gray*, 1 C. B. 578, the defendant, owning and occupying premises adjoining the highway, employed one Palmer to make a drain from his land to the common sewer. In doing the work, the men employed by Palmer placed gravel on the highway, in consequence of which the plaintiff, in driving along the road, sustained a personal injury. There was evidence that, upon the defendant's attention being called to the gravel, he promised to remove it. The matter left to the jury was whether the defendant wrongfully put, or caused to be put, the gravel on the highway. "I think," says Tindal, C. J., "there was evidence to leave to the jury in support of that charge. If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother Byles, and that the damage should be made good by the contractor, and not by the individual for whom the work was done." After adverting to the evidence that the soil was placed upon the road with the defendant's consent, if not by his express direction, he says, "I therefore think the case is taken out of the rule in *Bush v. Steinman*, which is supposed to be inconsistent with the later authorities." Coltman, J., said, "I think there was evidence enough to satisfy the jury that the entire control of the work had not been abandoned to Palmer." Cresswell, J., said, "No precise contract for the work was proved; nor was it shown that Palmer was employed to do the work personally, the mode of doing it being left to his judgment and discretion. I think there was abundant evidence to show that the defendant at least sanctioned the placing of the nuisance on the road." Earl, J., said, "The work was done with the knowledge of the defendant, and under his superintendence, and for his benefit." This well-considered case, it is plain, so far from affirming the rule in *Bush v. Steinman*, is carefully and anxiously taken out of it by the counsel and by the court, with the strongest intimation by the latter that, but for the difference, the action could not be maintained.

The latest case in England, referred to in the learned argument of the plaintiff's counsel, as affirming the doctrine of *Bush v. Steinman*, is *Sadler v. Henlock*, in the Queen's Bench (1855), 4 El. & Bl. 570. The defendant, with the consent of the owner of the soil and the surveyor of the district, employed one Pearson, a laborer, but skilled in the construction of drains, to cleanse a drain running from the defendant's garden under the public road, and paid five shillings for the job. Held, that the defendant was liable for an injury occasioned to the plaintiff by reason of the negligent manner in which Pearson had left the soil of the road over the drain. The case is put by all the judges distinctly on the relation of master and servant; and Crompton, J., said: "The test here is whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee. It is only on the ground of a contractor not being a servant that I can understand the authorities." The case of *Bush v. Steinman* is not referred to by either of the justices; but the distinction of servant and contractor runs through the whole case, — a distinction which is wholly inconsistent with the doctrine of *Bush v. Steinman*.

In *Laugher v. Pointer*, 5 B. & C. 547 and 8 D. & R. 556 (1826), where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to the horse of a third person, it was held by Lord Tenterden, C. J., and Littledale, J., that the owner of the carriage was not liable for such injury; Bayley and Holroyd, Justices, dissenting. This case is in substance the one put by Mr. Justice Heath, in illustration and support of the judgment in *Bush v. Steinman*. In the opinion of Lord Tenterden and of Littledale, J., the doctrines of *Bush v. Steinman*, in their application to personal property, are examined, and their soundness questioned.

In *Quarman v. Burnett*, 6 M. & W. 499 (1840), the same question arose in the Exchequer as in *Laugher v. Pointer* in the King's Bench, and the opinions of Lord Tenterden and Littledale, J., were affirmed, in a careful opinion pronounced by Baron Parke. In the course of it, he says: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the

acts of his servant ; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer, he who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey ; and whether such servant has been appointed by the master directly, or immediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist."

These cases, however, do not overrule *Bush v. Steinman*, as to the liability of owners of real estate.

The case of *Milligan v. Wedge*, 12 Ad. & El. 737 and 4 P. & Dav. 714 (1840), is also in relation to the use of personal property, and rests upon the rule settled in *Quarman v. Burnett*. But in this case Lord Denman suggests a doubt whether the distinction as to the law in cases of fixed and movable property can be relied on.

The case of *Rapson v. Cubitt*, 9 M. & W. 710 (1842), was this : The defendant, a builder, employed by the committee of a club to make certain alterations at the club-house, employed a gas-fitter, by a sub-contract, to do that part of the work. In the course of doing it, by the negligence of the gas-fitter, the gas exploded, and injured the plaintiff. Held, that the defendant was not liable. The reasons upon which this decision is based do not well consist with the rule in *Bush v. Steinman*.

The case of *Allen v. Hayward*, 7 Ad. & El. N. S. 960 (1845), is still more directly adverse. But we pass from these to cases directly in point.

In the cases of *Reedie & Hobbit v. London and North-western Railway*, 4 Exch. 244, 254 (1849), the defendants, empowered by act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and, by the contract, reserved to themselves the power of dismissing any of the contractors' workmen for incompetence. The workmen, in constructing a bridge over a highway, negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him. In an action against the company, it was held that they were not liable, the terms of the contract making no difference. In the judgment of the court, given by

Baron Rolfe (now Lord Chancellor Cranworth), alluding to the supposed distinction as to real property, the court say: "On full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and, in fact, that, according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded." Without sanctioning this doctrine, as it affects a public trust, it is very plain that it directly overrules the doctrine of *Bush v. Steinman*.

The case of *Knight v. Fox*, 5 Exch. 721 (1850), is, if possible, a stronger case in the same direction, — a decision which, it is plain, could not have been made if the doctrines of *Bush v. Steinman* were the law of Westminster Hall.

There are three cases remaining. In *Overton v. Freeman*, 11 C. B. 867 (1851), A. contracted to pave a district, and B. entered into a sub-contract with him to pave a particular street. A. supplied the stones, and his carts were used to carry them. B.'s men, in the course of the work, negligently left a heap of stone in the street. The plaintiff fell over them, and broke his leg. It was held that A. was not liable, even though the act complained of amounted to a public nuisance. And Maule, J., said that the case of *Bush v. Steinman* "has been considered as having laid down the law erroneously."

In *Peachey v. Rowland*, 13 C. B. 182 (1853), the defendants contracted with A. to fill the earth over a drain, which was being made for them across a portion of the highway, from their house to the common sewer. A., after having filled it in, left the earth so heaped above the level of the highway, as to constitute a public nuisance, whereby the plaintiff, in driving along the road, sustained an injury. The case had this other feature. A few days before the accident, and before the work was finished, one of the defendants had seen the earth so heaped over a portion of the drain; but beyond this there was no evidence that either defendant had interfered with, or exercised any control over, the work. It was held there was no evidence to go to the jury of the defendants' liability. *Bush v. Steinman* appears not to have been cited by counsel or alluded to by the court.

The still more recent case of *Ellis v. Sheffield Gas Consumer's Co.*, 2 El. & Bl. 767 (1853), cited by the counsel for the plaintiff,

only determined that a party employing another to do an act unlawful in itself, will be liable for an injury such act may occasion, — very familiar and well-settled law.

Bush v. Steinman is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been. No one can have examined the case without feeling the difficulty of that clear-headed judge, Chief Justice Eyre, of knowing on what ground its decision was put. It could not stand on the relation of master and servant. That relation did not exist. It could not stand upon the ground of the defendant having created or suffered a nuisance upon his own land, to the injury of his neighbor's property. The lime was on the highway. There is no rule to include it, but the indefinitely broad and loose one that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, — a rule which ought to have been and was expressly repudiated.

The case of *Leslie v. Pounds*, 4 Taunt. 649, not cited in the argument, has some resemblance to the cases before referred to. This was an action against the landlord of a house leased, who, under contract with the tenant who was bound to repair, employed workmen to repair the house and superintended the work. Being remonstrated with by the commissioners of pavements as to the dangerous state of the cellar, he promised to take care of it, and had put up some boards temporarily as a protection to the public. They proved insufficient, and, the plaintiff falling through, the landlord was held liable. The case was decided on the ground that the landlord was making the repairs, and that the workmen were employed by him, and were his servants.

The suggestion is made that, whatever may be the result of the later cases in England, the doctrine of *Bush v. Steinman* has been affirmed in this country. The cases in this court we have already examined.

The case of *Bailey v. Mayor, &c.*, of New York, 3 Hill, 531, and 2 Denio, 433, was an action brought against the corporation of New York for the negligent and unskilful construction of the dam for the water-works at Croton River, by the destruction of which injury was occasioned to the mills of the plaintiff. The city was held responsible. This case rests well upon the ground that where persons are invested by law with authority to execute

a work involving ordinarily the exercise of the right of eminent domain, and always affecting rights of third persons, they are to be liable for the faithful execution of the power, and cannot escape responsibility by delegating to others the power with which they have been intrusted.

Blake v. Ferris, 1 Seld. 48, seems to conflict with *Bailey v. Mayor, &c.*, of New York. Certain persons were permitted to construct a public sewer at their own expense; they employed another person to do it at an agreed price for the whole work; the plaintiffs received an injury from the negligent manner in which the sewer was left at night. It was held that the persons who were authorized to make the sewer were not responsible for the negligence of the servants of the contractor. This case utterly rejects the rule of *Bush v. Steinman*.

The case of *Stevens v. Armstrong*, 2 Seld. 435, was this: A. bought a heavy article of B., and sent a porter to get it; by permission of A., the porter used his tackle and fall; through negligence, the porter suffered the article to drop, by which C. was injured. It was held, that the porter acted as the servant of B., and that A. was not answerable. Yet this was an injury done on A.'s estate, by his permission, and in the use of his property. This case also rejects the rule of *Bush v. Steinman*.

In *Lesper v. Wabash Navigation Co.*, 14 Ill. 85, where a corporation was authorized to construct public works, and contracted with others to do the work and find the materials, and the contractors nevertheless took the materials, under the authority granted to the corporation, the corporation were held liable therefor. If the court could find that the materials were taken under the authority of the corporation, the case will stand perfectly well under the rule of *Lowell v. Boston and Lowell Railroad*, and *Bailey v. Mayor, &c.*, of New York.

The case of *Willard v. Newbury*, 22 Vt. 458, and *Batty v. Duxbury*, 24 Vt. 155, rest on the same principles.

In the case of *Wiswell v. Brinson*, 10 Ired. 554, the court held an owner of real estate responsible for the negligence of the servants of a carpenter with whom the defendant had contracted, for a stipulated price, to remove a barn on to his premises. This case (in which, however, there was a divided judgment, Ruffin, C. J., dissenting in a very able opinion), certainly sustains the doctrine of *Bush v. Steinman*.

De Forrest v. Wright, 2 Mich. 368, not cited, is in direct conflict with the rule of *Bush v. Steinman*. A public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer, at so much a barrel.

While in the act of delivering it, one of the barrels, through the carelessness of the drayman, rolled against and injured a person on the sidewalk. It was held that the employer was not liable for the injury, the drayman exercising a distinct and independent employment, and not being under the immediate control and direction or supervision of the employer. This is a well-considered case, rejecting the rule of *Bush v. Steinman*, and sanctioning the result to which we have been brought in the case at bar.

We have thus, at the risk of tediousness, examined the case at bar as one of authority and precedent. The clear weight and preponderance of the authorities at common law is against the rule given to the jury.

The rule of the civil law seems to have limited the liability to him who stood in the relation of *paterfamilias* to the person doing the injury. Inst. lib. 4, tit. 5, §§ 1, 2; 1 Domat, pt. 1, lib. 2, tit. 8, § 1; Dig. lib. 9, tit. 2, § 1.

Viewing this as a question, not of authority, but to be determined by the application to these facts of settled principles of law, upon what principle can the defendant be held responsible for this injury? He did not himself do the act which caused the injury to the plaintiff. It was not done by one acting by his command or request. It was not done by one whom he had the right to command, over whose conduct he had the efficient control, whose operations he might direct, whose negligence he might restrain. It was not an act done for the benefit of the defendant, and from the doing of which an implied obligation for compensation would arise. It was not an act done in the occupation of land by the defendant, or upon land to which, upon the facts, he had any title. To say that a man shall be liable for injuries resulting from acts done near to his land is to establish a rule as uncertain and indefinite as it is manifestly unjust. It is to make him liable for that which he cannot forbid, prevent, or remove. The case cannot stand on the relation of master and servant. It cannot stand upon the ground of nuisance erected by the owner of land, or by his license, to the injury of another. It cannot

stand upon the ground of an act done in the execution of a work under the public authority, as the construction of a railroad or canal, and from the responsibility for the careful and just execution of which public policy will not permit the corporation to escape by delegating their power to others. It can only stand where *Bush v. Steinman*, when carefully examined, stands, upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do; to adopt which would be to ignore all limitations of legal responsibility.

As the determination of this, the first and most material of the exceptions, may probably finally dispose of the cause, we have not considered the other parts of exception to the rulings of the presiding judge.

New trial granted.

Who liable. (a) Landlord and Tenant. — The principal case, *Fisher v. Thirkell*, contains such a full and satisfactory discussion of the liability of the owners of premises, of which they are not in possession, to persons who suffer damage by reason of the negligence of those who are in possession, as to leave little more to be said.

We have upon a previous page (495) referred to cases in which an attempt was made to hold the landlord of a tenement building liable for injury sustained by one tenant from the escape of water from the water-closet of tenants above; in which it was held that the landlord was not bound to keep the water from the plaintiff's premises at all hazards. *Ross v. Fedden*, Law R. 7 Q. B. 661. Nor, according to the doctrine of *Fisher v. Thirkell*, would the landlord, apart from agreement, be liable for injury thus sustained, if it were caused by the negligence of the upper tenant. (But see *Marshall v. Cohen*, 44 Ga. 489; *ante*, 495, 496.) A lease is in truth a sale of the particular estate; and, in the absence of any thing therein to the contrary, the lessee

quoad hoc stands as independent of the lessor (towards third persons) as if he were a purchaser of the fee.

If, notwithstanding a lease, the landlord retain possession or control over the premises, he will be liable for injuries resulting from a failure to perform a duty required by law; such as the duty to keep a wharf in repair. See *Taylor v. New York*, 4 E. D. Smith, 559, where the corporation of New York City was held liable to the plaintiff for injuries sustained by reason of the insecure condition of a wharf belonging to the city, though the right to collect wharfage had been leased to another. And it was held immaterial in this case, that by the terms of the lease the lessee was bound to repair. But the court observed that the tenant would have been liable had the lease been a grant of the *pier* for the term, instead of the mere wharfage dues.

So, of course, the landlord will be liable for injuries sustained by reason of his own negligence, though he has wholly given up the possession and control of the premises to the tenant; as was said in *Fisher v. Thirkell*. See

also *Shearman & Redf.*, Negligence, § 502, and cases cited.

But though the landlord retain possession of the premises with the tenant, he will not be liable for injuries sustained by the tenant's customers and visitors, if he have not induced them to come there. And *a fortiori* if the tenant is in exclusive possession. See *Robbins v. Jones*, 15 Com. B. N. S. 221, 240.

See further, upon this subject, *Moore v. Goedel*, 7 Bosw. 591; s. c. 84 N. Y. 527; *Warren v. Kauffman*, 2 Phila. 259; *Killion v. Power*, 51 Penn. St. 429; *Robbins v. Mount*, 4 Robt. (N. Y.) 553; *Ortmayer v. Johnson*, 45 Ill. 469; *Shearman & Redf.*, Negligence, §§ 512-514.

(b) *Contractors*.—The doctrine of *Hilliard v. Richardson*, *supra*, has become settled law, both in this country and in England. The owner of premises is not liable for the acts or omissions of one engaged in work thereon, over whom he has no control, though that person be under contract with the owner, and be at the time of the injury engaged in the performance thereof; subject to the exceptions laid down by the learned judge.

In the recent case of *Cuff v. Newark & N. Y. R. Co.*, 6 Vroom, 17, the plaintiff sued the defendant for the death of her husband. The facts in brief were that the defendants, being engaged in the construction of a railroad, had let the work of grading and masonry to the firm F. & S. This firm had, with the consent of the defendants, sub-contracted with S. to make certain rock excavations. The deceased was killed while engaged in this latter work, through the negligence of one of S.'s servants,—in the use of nitro-glycerine upon the defendants' premises. S. had

applied to and obtained permission of the company to occupy a portion of their land for the erection of a magazine in which to store the oil necessary for the work of blasting. The contract between the defendants and F. & S. declared that the work of excavating should not be sublet to any one without the consent of the former, and that the latter should discharge any incompetent or disorderly workmen employed by them (F. & S.) when required so to do by the defendants. The latter consented to the subletting to S., but made no contract with him themselves. It was held that the plaintiff could not recover. The authorities were extensively reviewed, and the same conclusion reached as that stated by Mr. Justice Thomas, *supra*, that *Bush v. Steinman* was no longer considered as law, if it ever had been.

The attempt was made by counsel to avoid the effect of the current of authority by the argument that, as the defendants had retained the power to order the discharge of incompetent workmen, the employees were all in effect their servants. But this was denied by the court. It was observed that this position was based upon an erroneous notion as to the foundation of the maxim *respondeat superior*. The point of inquiry was not under what circumstances was the owner, who lets the particular contract, exempt from liability for the negligence of the employees of the contractor. The question of liability depended upon the relation of master and servant, incident to which was the power to select the servant, direct him in the performance of his work, and to discharge him when found incompetent; and also the duty to so control his acts that no injury might be done to third persons. There

were cases, it was further said, in which those who have let work on contract had been held liable for negligence in the manner of doing it; but those were cases in which the contract created only the ordinary hiring for service, or the party who let the work retained and exercised the control and direction of the employees by whom the manual labor was done, or personally participated in the wrong complained of. *Randleson v. Murray*, 8 Ad. & E. 109; *Sadler v. Henlock*, 4 El. & B. 570; *Burgess v. Gray*, 1 Com. B. 578; *Fenton v. Dublin Steam Packet Co.*, 8 Ad. & E. 835.

Another class of cases was also referred to and distinguished; to wit, those in which municipal corporations have been held liable for the negligence of the servants of their contractors in making excavations in the public streets; and those in which railroad companies have been held for damages sustained by passengers by reason of defects in the platform of their depots, occasioned by the carelessness of employees of contractors to whom the work of construction had been let. But these cases did not rest on the relation of master and servant. The obligation resulted from the duty, in the one case, to see that the streets are kept safe for the passage of persons and property, and, in the other, to provide for passengers a safe means of access to and from the cars, — a duty independent of the means by which the obstructions or defects were occasioned. *Storrs v. City of Utica*, 17 N. Y., 104; *Chicago v. Robbins*, 2 Black, 418; *Holmes v. North-eastern Ry. Co.*, Law R. 4 Ex. 254; *Gillis v. Pennsylvania Railway Co.*, 8 Am. Law Reg. n. s. 729; *Smith v. London, &c., Docks Co.*, Law R. 3 Com. P. 326. (As to the case of railroad companies, the

liability doubtless arises only after the work of the contractor has been accepted, and has thus in fact and in law become the work of the owner of the property. While the contractor remains at work (as such), the railroad company cannot be liable.)

The same doctrine, as we have said, prevails in England. It has there indeed been decided that the employment of their own surveyor by a company having work done under a contract, to superintend it and direct *what* shall be done, will not make the company liable for negligence in the *manner* of doing it, though it was directed to be done by the surveyor. *Steel v. South-eastern Ry. Co.*, 16 Com. B. 550. So, in *Brown v. Accrington Cotton Co.*, 3 Hurl. & C. 511, one who had a building erected by contract was held not liable for injury occasioned to a workman in the building, by reason of its negligent construction, though the owner employed a clerk to superintend the construction; provided he did not personally interfere in the work, and was not guilty of negligence in the appointment or retention of the clerk. See also *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 433.

But a distinction (alluded to in *Fisher v. Thirkell*) is to be observed between the above cases and those in which it appears that the act contracted to be done is *ab initio* illegal. In the latter case the owner is liable. In *Ellis v. Sheffield Gas Co.*, 2 El. & B. 767, it appeared that the defendants had engaged a certain firm to open trenches along the streets of Sheffield, in order that they might lay down gas-pipes there. The contracting firm performed the work in such a negligent manner that the plaintiff was thereby injured. No authority had been granted to thus lay open the

street; and the court, while admitting the general rule, held the defendants liable on this ground.

The act of the defendants in this case was a public nuisance, but that was not sufficient. The cases spoken of in the principal case (*Hilliard v. Richardson*) are those of nuisances brought upon land *belonging to the defendant*. Where the nuisance is caused upon land of the public, it is necessary that the work by which it was caused should have been illegal from the beginning, as was the case in *Ellis v. Sheffield Gas Co.*, *supra*. In *Overton v. Freeman*, 11 Com. B. 867, *infra*, the act out of which the injury grew was a public nuisance; but the work was itself legal, and therefore the principal was not liable. I must not allow my contractor to create a nuisance upon premises under my control; but it does not affect me if he does it on land of the public, provided I employed him in a lawful enterprise, and had no part in the particular acts or omission.

That the occupant having control of premises is liable for the acts and omissions of his contractor, see also *Homan v. Stanley*, 66 Penn. St. 465, where the contractor had carried an excavation out under the sidewalk.

It would seem that, in case of a work illegal *ab initio*, the contractor would be equally liable with the proprietor or principal, even though the latter has ordered the doing or omission of the particular thing out of which the damage sprung; though it would be otherwise where the undertaking was lawful. Yet there is probably a qualification to this latter branch of the proposition; as where, though the undertaking was itself lawful, the particular part out of which the injury grew was a violation of the rights of the public. Indeed, the

distinction taken in the above cases is rather based upon a difference between the violation of public and that of private rights; but we apprehend that this is but part of a wider rule of law.

In the French law the same distinction between damage as the effect of a violation of public and of private rights is taken. M. Sourdat, a learned writer on Delicts, speaking of the liability of builders and architects, says: "Il faut seulement observer que le constructeur ne peut se mettre à l'abri de l'action des tiers en alléguant qu'il n'a fait que se conformer aux ordres du propriétaire, lorsqu'il s'agit d'une contravention aux règles de l'art et aux règlements de police relatifs à la solidité et à la sécurité des bâtiments, en un mot, à tout ce qui intéresse l'ordre public. Un architecte doit se refuser à exécuter des ordres pareils.

"S'il s'agit d'une infraction aux lois du voisinage, qui n'intéresse que l'ordre privé, comme si une fosse d'aisances a été construite trop près du mur du voisin; si une fenêtre a été ouverte sur son héritage plus près que la loi ne permet, le constructeur peut se faire décharger, même vis-à-vis du voisin, en prouvant que le propriétaire lui a donné des ordres exprès en se chargeant de la responsabilité, car celui-ci peut transiger avec le réclamant, et peut-être aussi a-t-il à faire valoir un droit de servitude qui rendrait la dérogation à la loi tout à fait légitime." *Traité de la Responsabilité*, vol. ii. § 672.

The same writer adds, in the following section, "Cette responsabilité s'applique à tout constructeur qui n'est pas l'agent passif du propriétaire ou de celui qui le remplace. . . . Peu importe qu'il s'agisse d'un édifice à prix fait ou dont le prix se règle par l'étendue des travaux. Il suffit que le constructeur

les ait personnellement faits ou dirigés." See also *post*, p. 659, as to the relation of builder and architect.

Another ground of liability was urged in *Cuff v. Newark & N. Y. R. Co.*, *supra*, based upon the use by the sub-contractor of the defendant's premises, as above stated; and this, it seems, would have been upheld had not the injury been caused by the intervention of a third person. But the chain of causation had thus been broken, and the defendants could not be considered as having, in the legal sense, caused the damage. See, upon this point, the note to *Thomas v. Winchester*, *ante*, p. 608.

See further, as to who are contractors, *Brackett v. Lubke*, 4 Allen, 138; *Wood v. Cobb*, 13 Allen, 58; *Railroad Co. v. Hanming*, 15 Wall. 649; *Camp v. Church Wardens*, 7 La. An. 321; *Painter v. Pittsburgh*, 46 Penn. St. 213.

(c.) *Sub-contractors*. — The principle upon which the proprietor is exempted from liability for the negligence of his contractor prevails as between the contractor and his sub-contractor, under the same circumstances. *Cuff v. Newark & N. Y. R. Co.*, 6 Vroom, 17, 28; *Rapson v. Cubitt*, 9 Mees. & W. 710; *Knight v. Fox*, 5 Ex. 721; *Overton v. Freeman*, 11 Com. B. 867.

In *Rapson v. Cubitt*, a leading case on this point, the defendant, a builder, was employed to make certain alterations in a club-house. He sublet to a gas-fitter the work of preparing the gas-fittings. In consequence of the negligence of the latter, or of his servants, the gas exploded and injured the plaintiff. It was held that the plaintiff's remedy was against the gas-fitter, and not against the defendant.

In *Overton v. Freeman*, A. had contracted with parish officers to pave a

certain district, and made a sub-contract with B., by which the latter was to lay the paving of a certain street with materials to be furnished by A. Preparatory to paving, the stones were laid by servants of B. on the pathway, and there left in such a manner as to obstruct the same; and C. fell over them, and broke his leg. It was held that C. could not maintain an action against A. (As to the distinction between this case and *Ellis v. Sheffield Gas Co.*, 2 El. & B. 767, see *supra*, p. 656.) The case of *Matthews v. West London Water-works Co.*, 3 Campb. 403, was overruled.

Knight v. Fox was a still stronger case. There the sub-contractor was in fact, for some purposes, the servant of the defendant. The defendant had employed him as his general servant and surveyor; and he had the management of the defendant's business in London, for which he received an annual salary. In this particular case the defendant engaged him by contract for £40 to erect a scaffold, which had become necessary in building a bridge; and the defendant was to furnish the materials. But it was held that the defendant was not liable for damage sustained by reason of the negligence of his sub-contractor's workmen.

(d.) *Servants employing Others*. — A servant who merely hires laborers for the performance of the master's work is not in the situation of a sub-contractor, and cannot be held for damages caused by the negligence of such laborers. Thus, a gardener or steward, who employs laborers under him to do his master's work, is not answerable for the defaults or improper conduct of such laborers. In such cases the action must be brought either against the hand committing the injury, or against

the owner for whom the act was done, or against both jointly. Addison, Torts, 412 (4th ed.); *Stone v. Cartwright*, 6 T. R. 411; *Wilson v. Peto*, 6 Moore, 49.

(c.) *Servants under Double Masters.*

— But it is to be observed that, where the injury occurred by reason of the negligence of the defendant's servants, the fact that they were also under the direction of a contractor at the time will not in all cases excuse the defendant. Indeed, both may be liable.

In *Fenton v. Dublin Packet Co.*, 8 Ad. & E. 835, it appeared that the defendants, being owners of a steam vessel, chartered her to D. for six months at £20 per week, the owners to keep her in good and sufficient order for the conveyance of goods, &c., from N. to G., or any other coasting station which D. might employ her in; D. to pay all disbursements, including harbor dues, pilotages, seamen's and captain's wages, and coal, oil, tallow, &c., for engines, and to insure the vessel. The plaintiff having declared in case for the negligent sinking of his vessel by a steamboat of which the defendants were alleged to be in possession and charge by their servants and mariners, to which allegation there was a traverse, it was held that upon the interpretation of the charter alone the defendants were liable. And this was true, *a fortiori*, upon proof that D. had no power to appoint or dismiss the officers or crew, and did not interfere in the arrangements of the crew. Mr. Justice Patteson said: "I do not say that they [the crew] are not the servants of the charterer. *Laugher v. Pointer*, 5 Barn. & C. 547, does not bear on the point. To hold that the hirer is liable is not inconsistent with holding the latter liable also; and since that case it has

been held that the latter is liable [referring apparently to *Smith v. Lawrence*, 2 Man. & R. 1, Rep.] . . . The charterer hires the steam vessel for six months, with the option of retaining her six months longer; but the owners are to keep her in good order, and the charterer is not to find seamen, coals, &c., but to pay for all disbursements in these and other respects. Therefore I think it clear that the owners are to have their own engineer and servants on board, and that the charterer is to pay for them. These are therefore the servants of the owners."

In *Dalyel v. Tyrer*, El., B. & E. 899, the lessee of a ferry had hired a steamer of the defendants, with a crew who were the latter's servants; and it was held that the defendants were liable for injury to passengers caused by the negligence of the crew, although the passengers had contracted with the lessee of the ferry for conveyance in the steamer, and had paid their fares to him. The ground taken by the court was that the defendants were by their crew in possession of the vessel; and the liability of the defendants was not changed by the fact that the lessee also may have been liable. See *ante*, p. 616.

In general, then, as the rule has been stated in *Massachusetts*, the fact that there is an intermediate party, in whose general employment the person whose acts are in question is engaged, does not prevent the principal or master from being held liable for the negligent conduct of the sub-agent or under-servant, unless the relation of such intermediate party to the subject-matter of the business in which the under-servant is engaged be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed

therefor. Wells, J., in *Kimball v. Cushman*, 103 Mass. 194, 198.

(f.) *Bank Directors and Bank Officers.* — In a recent case it has been decided that bank directors are personally liable for a misappropriation of a special deposit by the officers of the bank, provided the directors are themselves guilty of negligence in respect of their duties in keeping a proper oversight of the bank. *United Soc. of Shakers v. Underwood*, 9 Bush, 609. But no case, so far as we are aware, has decided that the relation of principal and agent exists between the directors and bank officers, so as to make the former liable for the defaults of the latter, when not themselves guilty of a violation of duty. Nor is the above case, perhaps, authority for holding directors liable to creditors of the bank for a mere omission to look after the interests of depositors. The facts alleged in the complaint indicated something like knowledge of the misappropriation. See also *Salmon v. Richardson*, 30 Conn. 860. Ordinarily (for there are exceptions) an action cannot be maintained by a third person for a simple non-feasance, since the duty is only to act faithfully when a thing is undertaken.

(g.) *Builders and Architects.* — We close this note with a further extract from the law of France concerning the relation of builders and architects, a subject which has not yet drawn the attention of the English or American courts. "Le quasi-délit des constructeurs," says Sourdats, "peut avoir une double origine: 1. L'inobservation des règles de l'art, ce qui embrasse tous les défauts de construction, vices du sol, vices du plan, malfaçons. 2. L'inobservation des lois et règlements du voisinage, par exemple, le fait d'avoir bâti contre la propriété d'autrui sans

avoir pris les précautions indiquées par l'article 674 du code civil. . . .

"L'architecte pourrait être ainsi tenu des infractions aux lois de police et du voisinage qui résulteraient des plans. Ce ne serait pas l'entrepreneur qui encourrait la responsabilité, car il ne doit que suivre fidèlement les plans et non rectifier.

"Si l'architecte est chargé de présider à l'exécution de surveiller le travail de l'entrepreneur, il peut être tenu de toutes les suites de la négligence qu'il apporterait dans ses fonctions. Ainsi, soit que le plan n'ait pas été fidèlement exécuté, et qu'il en soit résulté des vices de construction, soit que l'entrepreneur ait fourni de mauvais matériaux, soit qu'il existe des malfaçons, ceux qui souffrent des inconvénients qui en résultent ont action contre l'architecte. Nous pensons, toutefois, que la responsabilité de celui-ci n'est pas absolue, comme on pourrait l'induire des expressions de l'article 2270." 2 Sourdats, *Traité de la Resp.* §§ 672-674.

His reasons for this last opinion, however true the position itself may be, are not satisfactory to the English lawyer. As to those things, observes Sourdats, which are under the personal direction of the builder and his servants, the architect is bound to a general inspection and surveillance only. If he has given the orders necessary to shun bad work (*malfaçons*), and has pointed out the defects in the materials on hand, he escapes liability. If he has not, he is liable, "mais non d'une manière complète et principale. L'obligé principal c'est l'agent direct du dommage, c'est l'entrepreneur, l'ouvrier qui, par fraude ou négligence, aura mal exécuté l'ouvrage qui lui était confié. La cause immédiate du dommage c'est son fait.

C'est donc lui qui doit en fournir la réparation. La négligence de l'architecte n'est qu'une chose secondaire et accessoire. *Il ne doit donc être tenu que subsidiairement, comme une caution, et en cas d'insolvabilité du débiteur principal.*" *Ib.*

The following decisions of the French courts are reported by Dalloz: —

"La responsabilité du défaut de solidité d'une maison incombe exclusivement à l'architecte, et non à l'entrepreneur qui a travaillé sur les plans et sous la direction de l'architecte, alors que les travaux et les matériaux sont irréprochables." *Jurisp. Gén.* 1872, Deuxième partie, p. 110 (*Cours d'Appel*).

"L'architecte chargé de dresser le plan des travaux de construction et de les vérifier une fois terminés, n'est pas responsable des malfaçons commis par l'entrepreneur." *Ib.* *Prem. part.* p. 246 (*Cours de Cassation*).

"La responsabilité imposée à l'architecte par les art. 1792 et 2270, Code Nap. s'applique à celui qui a dirigé les travaux exécutés sur les plans qu'il

a fournis, comme à celui qui a construit à prix fait. Cette responsabilité n'est pas limitée au cas spécialement prévu par l'art. 1792, c'est à dire, à la destruction totale ou partielle de l'édifice construit; elle s'étend à toutes les conséquences dommageables qui sont, de la part de l'architecte, le résultat d'une faute contre les principes de son art ou les règles dont il comporte la connaissance, et spécialement aux dégradations qui peuvent résulter, pour les maisons voisines, de l'exécution des travaux confiés à sa direction. L'architecte ne peut s'affranchir de la responsabilité qui lui est imposée par les art. *supra*, en alléguant soit le consentement, soit même les ordres du propriétaire." *Ib.* 1865, *Deux. part.* p. 39 (*Cours Impériales*).

See further cases referred to in the Index of Dalloz, tit. Louage Ouvrage; also *ante*, p. 657. The provisions of the Code Napoleon, it should be observed, however, refer to questions arising between the owner and architect or builder.

MILES SWEENEY *v.* OLD COLONY AND NEWPORT RAILROAD COMPANY.

(10 Allen, 368. Supreme Court, Massachusetts, January Term, 1865.)

Licenses. If a railroad company have made a private crossing over their track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness.

TORT to recover damages for a personal injury sustained by being run over by the defendants' cars, while the plaintiff was crossing their railroad by license, on a private way leading from South Street to Federal Street, in Boston.

At the trial in this court, before Chapman, J., it appeared that this private way, which is called Lehigh Street, was made by the South Cove Corporation for their own benefit, and that they own the fee of it; that it is wrought as a way, and buildings are erected on each side of it, belonging to the owners of the way, and there has been much crossing there by the public for several years. The defendants, having rightfully taken the land under their charter, not subject to any right of way, made a convenient plank crossing and kept a flagman at the end of it on South Street, partly to protect their own property, and partly to protect the public. They have never made any objection to such crossing, so far as it did not interfere with their cars and engines. There are several tracks at the crossing. The only right of the public to use the crossing is under the license implied by the fact stated above.

On the day of the accident the defendants had a car at their depot which they had occasion to run over to their car-house. It was attached to an engine and taken over the crossing, and to a proper distance beyond the switch. The coupling-pin was then taken out, the engine reversed, and it was moved toward the car-house by the side track. The engine was provided with a good engineer and fireman, and the car with a brakeman; the bell was constantly rung, and the defendants were not guilty of any negligence in respect to the management of the car or engine.

As the engine and car were coming from the depot, the plaintiff, with a horse and a wagon loaded with empty beer barrels, was coming down South Street from the same direction. There was evidence tending to show that, as he approached the crossing, the flagman, who was at his post, made a signal to him with his flag to stop, which he did; that, in answer to an inquiry by the plaintiff whether he could then cross, he then made another signal with his flag, indicating that it was safe to cross; that the plaintiff started and attempted to cross, looking straight forwards; that he saw the car coming near him as it went towards the car-house; and that he jumped forward from his wagon, and the car knocked him down and ran over him and broke both his legs. It struck the fore wheel of his wagon, and also his horse. If he had remained in his wagon, or had not jumped forwards, or had kept about the middle of the crossing, the evidence showed that he

would not have been injured personally. His wagon was near the left-hand side of the plank crossing as he went.

The defendants contended that even if the plaintiff used ordinary care, and if the flagman carelessly and negligently gave the signal that he might cross, when, in fact, it was unsafe to do so on account of the approaching car, the plaintiff was not entitled to recover, because the license to people to use the crossing was not a license to use it at the risk of the defendants, but to use it as they best could when not forbidden, taking care of their own safety, and going at their own risk; and also that if the flagman made a signal to the plaintiff that he might cross, he exceeded his authority.

But the evidence being very contradictory as to the care used by the plaintiff, and also as to the care used by the flagman, the judge ruled, for the purpose of taking a verdict upon these two facts, that the defendants had a right to use the crossing as they did on this occasion, and that they were not bound to keep a flagman there; yet, since they did habitually keep one there, they would be responsible to the plaintiff for the injury done to him by the car, provided he used due care, if he was induced to cross by the signal made to him by the flagman, and if that signal was carelessly or negligently made at a time when it was unsafe to cross on account of the movement of the car.

The jury returned a verdict for the plaintiff for \$7,500; and the case was reserved for the consideration of the whole court.

S. J. Thomas, for the plaintiff.

BIGELOW, C. J. This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line, which marks the limit of the defendants' liability for damages caused by the acts of their agents, the case at bar falls. But on careful consideration we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which

the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or de-

fect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best-considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby v. Hill*, 4 C. B. N. s. 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials and sustained damage, for which the owner was held liable. Cockburn, C. J., says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of

access thereto." In *Chapman v. Rothwell*, El., Bl. & El. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap-door to be open without sufficient light or proper safeguards, in a passage-way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage-way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by Keating, J., in *Hounsell v. Smyth*, 7 C. B. N. s. 738. In the last-named case the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger, and not on the owner. The same distinction is stated in *Barnes v. Ward*, 9 C. B. 392; *Hardcastle v. South Yorkshire Railway, &c.*, 4 Hurlst. & Norm. 67; and *Binks v. South Yorkshire Railway, &c.*, 32 Law Journ. N. s. Q. B. 26. In the last cited case the language of Blackburn, J., is peculiarly applicable to the case at bar. He says, "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See also, for a clear statement of the difference between cases where an invitation or allurement is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, *Balch v. Smith*, 7 Hurlst. & Norm. 741, and *Scott v. London Docks Co.*, 11 Law Times, N. s. 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot, in any just view of the evidence, be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was

situated between two streets of the city (which are much frequented thoroughfares), and was used by great numbers of people who had occasion to pass from one street to the other; and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway; but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the court, that the defendants induced the plaintiff to cross at the time when he attempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged among other things with the duty of protecting the public. This general statement of the object for which the agent

was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman in fact held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the court; nor do we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fulness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The court were not requested at the trial to withdraw the case from the jury on the ground that the plaintiff had failed to show

he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

Judgment on the verdict.

After the above decision was rendered, the verdict was set aside, by Chapman, J., as against the evidence.

INDERMAUR v. DAMES.

(Law R. 1 Com. P., 274; Ib. 2 Com. P., 318. Exchequer and Exchequer Chamber, England, 1866, 1867.)

Duty to give Notice of Dangerous Place. — Upon the premises of the defendant, who was a sugar refiner, was a hole, or shoot, on a level with the floor, used for raising and lowering sugar to and from the different stories of the building, and usual, necessary, and proper in the way of the defendant's business. Whilst in use, it was necessary and proper that this hole should be unfenced. When not in use, it was sometimes necessary, for the purpose of ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might, at such times, without injury to the business, have been fenced by a rail. Whether or not it was usual to fence similar places, when not in actual use, did not appear. The plaintiff, a journeyman gas-fitter, in the employ of a patentee who had fixed a patent gas regulator upon the defendant's premises, for which he was to be paid provided it effected a certain amount of saving in the consumption of gas, went upon the premises, with his employer's agent, for the purpose of examining the several burners, so as to test the new apparatus. Whilst thus engaged upon an upper floor of the building, the plaintiff, under circumstances as to which the evidence was conflicting, but accidentally, and, as the jury found, without any fault or negligence on his part, fell through the hole, and was injured. *Held*, that, inasmuch as the plaintiff was upon the premises on lawful business, in the course of fulfilling a contract in which he (or his employer) and the defendant both had an interest, and the hole or shoot was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced.

THIS was an action brought by the plaintiff to recover damages for an injury which he had sustained through the alleged negligence of the defendant and his servants. The declaration stated that the defendant was possessed of a high building, containing several floors, used by the defendant as a sugar refinery, in the interior of which was a shaft or shoot, passing from the basement of the building upwards through the several floors thereof,

and which said shaft or shoot was highly dangerous to persons entering the said building who might be unacquainted with the same, as the defendant then well knew ; and that the plaintiff, then being unacquainted with the said premises, was employed by the defendant to enter the said building and execute certain work in his trade of a gas-fitter, after darkness had set in, in the evening, for the defendant, upon one of the upper floors of the said building ; yet that the defendant, wrongfully, negligently, and improperly allowed the said shaft or shoot to remain and be open, unfenced, and unguarded and unlighted, whilst the plaintiff was executing the said work, whereby the plaintiff, whilst so employed as aforesaid, fell down the said shaft or shoot, and was precipitated through the same to the basement of the said building, and was greatly hurt, &c.

Pleas, — 1. Not guilty ; 2. That there was no such shaft or shoot, as alleged ; 3. That the said shaft or shoot was not dangerous, as alleged ; 4. That the defendant had no such knowledge of the said danger, as alleged ; 5. That the plaintiff was not employed by the defendant, as alleged. Issue thereon. The cause was tried before Erle, C. J., at the sittings in Middlesex after last Michaelmas Term. The facts are as follows: The plaintiff who was a journeyman gas-fitter, was, at the time of the accident hereinafter mentioned, in the employ of one Duckham, a gas engineer and fitter, who was the patentee of an improved self-acting gas-regulator. The defendant is a sugar-refiner, having extensive premises in Whitechapel. In June, 1864, Duckham, through one Hargreaves, his agent, agreed with the defendant, who was necessarily a large consumer of gas, to fit up on his premises two of his regulators, upon the terms mentioned in the following memorandum: "I hereby agree to attach two of my patent, self-acting gas-regulators to your meter in area ; and, should I fail to effect a saving of from 15 to 30 per cent on your previous consumption, I will remove the regulators, and restore the fittings at my own expense. Should I effect such saving, the machines will be considered, after test, as purchased, and a three-years guarantee given with them. The price to be (two 2-inch), £18.

On Saturday, the 25th of June, Hargreaves went to the defendant's premises, pursuant to appointment, for the purpose of fixing the apparatus. He was accompanied by the plaintiff and another workman in Duckham's employ, named Bristow, and a lad.

The plaintiff, however, not being upon that occasion quite sober, Mr. Woods, the defendant's manager, would not allow him to go upon the premises, and the regulators were fixed by Bristow, assisted by the lad, and the work was duly completed. In order to test the regulators, and ascertain that they answered the warranty as to saving in the consumption of gas, it was necessary for the workmen of the patentee to inspect every burner on the premises, to see that they were in a proper state. Bristow having had to do the work almost single-handed, it was too late to make the required inspection on the Saturday night; and accordingly Hargreaves went to the premises on the following Tuesday, accompanied by the plaintiff, in order to examine the several burners, and so test the apparatus. Before going there for that purpose, Hargreaves cautioned the plaintiff, saying: "Now, mind, Indermaur, sugar-houses are very peculiar places; they neither allow candles or lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man, and you keep close to me." When they arrived at the premises, Hargreaves and the plaintiff, accompanied by one of the defendant's workmen, with a light, proceeded to the first floor, and, after examining one of the burners, went round to another part of the floor for the purpose of inspecting another. In the mean time, the plaintiff, who had left a pair of plyers at the spot they first went to, turned back to fetch them; but, in returning, instead of going round the way Hargreaves and the defendant's man had gone, he walked straight across towards them, not perceiving an intervening hole in the floor, and fell through to the floor below, a depth of about thirty feet, and fractured his spine.

The hole in question was a shaft or shoot four feet three inches square, communicating from the basement to the several floors of the building. It was fenced at each side, but open back and front. It was necessary to the defendant's business to have such a shaft; and it was necessary that it should, whilst in use for the raising or lowering of goods, and occasionally also for purposes of ventilation, be open and unfenced; and there was no evidence to show that it was usual in buildings of the kind to adopt the precaution of fencing such shafts.

On the part of the defendant it was submitted that there was no duty or obligation on him to fence the shaft, and consequently no cause of action; and reliance was placed upon *Wilkinson v.*

Fairrie, 1 H. & C. 633, 32 L. J. Ex. 73. His lordship observed that, though as to persons employed in the business there might be no duty or obligation to fence, a very different degree of care might be due in the case of a person not so employed, but merely going there for a temporary lawful purpose, as this plaintiff did. He, however, reserved the point.

Several witnesses were then called on the part of the defendant; amongst others, Mr. Woods, the defendant's manager, who stated that the defendant's premises, which had been recently erected, were constructed in the same way as all sugar-refineries were constructed, and were not more than ordinarily dangerous; and that, if he had known that the plaintiff was coming to work upon the premises, he would not have allowed him to do so.

The evidence as to the number of lights on the floor at the time of the accident was conflicting. The plaintiff swore that there were only two; the defendant's witnesses that there were five, and that the light was ample. In his summing up, the Lord Chief Justice stated in substance as follows: The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person (permanently) employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business. And, after observing upon the facts, he told the jury, that, if they found that there was no negligence on the part of the defendant, or that there was want of reasonable care on the part of the defendant, but that there was also want of reasonable care on the part of the plaintiff, which materially contributed to the accident, the plaintiff was not entitled to recover; but that, if there was want of reasonable care in the defendant, and no want of reasonable care in the plaintiff, then the plaintiff was entitled to a verdict.

The jury returned a verdict for the plaintiff, damages £400.

Huddleston, Q. C., in Hilary Term, obtained a rule *nisi* to enter a nonsuit, on the ground that the evidence did not disclose any cause of action; or to arrest the judgment, on the ground that the declaration showed no breach of contract or breach of duty on the part of the defendant; or for a new trial, on the ground that the verdict was against the weight of evidence. He referred to *Seymour v. Maddox*, 16 Q. B., 326, 20 L. J. Q. B. 327; *Hounsell v. Smyth*, 7 C. B. N. s. 731, 29 L. J. C. P. 203; and *Wilkinson v. Fairrie*, 1 H. & C. 633, 32 L. J. Ex. 73. [WILLES, J., referred to *Farrant v. Barnes*, 11 C. B. N. s. 553; 31 L. J. C. P. 137.]

Ballantine, Serjt., and *Raymond*, showed cause. There was abundant evidence for the jury in this case, of a culpable want of due care on the part of the defendant as regards this plaintiff. He was on the premises, not as a mere volunteer, or in the character of a visitor, as in *Southcote v. Stanley*, 1 H. & N. 247, 25 L. J. Ex. 339; nor does the case fall within the class relating to injuries to servants in the course of their employ, by reason of defective machinery. Here the plaintiff was upon the premises by the permission of the defendant, in the performance of his duty as a gas-fitter. The nature of the premises, with its hidden dangers, was unknown to him; and the caution which was given to him did not go far enough; it did not call his attention to the particular peril, but seemed rather to be directed to the safety of the premises than to that of the individual. The rule as to dangerous pitfalls is accurately laid down in *Barnes v. Ward*, 9 C. B. 392, 19 L. J. C. P. 195; *Corby v. Hill*, 4 C. B. N. s. 556, 27 L. J. C. P. 318; and *Hounsell v. Smyth*. The application of that rule must depend upon the circumstances of each particular case. [WILLES, J. The proposition is, that this was a danger which was known to the defendant, but of which the plaintiff, to the knowledge of the defendant, was ignorant. Precisely so. It was conceded that this shaft or shoot was matter of imminent peril, unless the floor was properly lighted, as to which there was a conflict of testimony, which is disposed of by the finding of the jury. The case which approaches the nearest to this undoubtedly is that of *Wilkinson v. Fairrie*, 1 H. & C. 633, 32 L. J. Ex. 73. There the plaintiff, a carman, was sent by his employer to the defendant's premises to fetch some goods.

After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting-house, where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase, and was seriously injured. The Court of Exchequer held that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase. The obvious distinction between that case and this is pointed out by Pollock, C. B. He says: "My brother Bramwell directed a nonsuit upon this alternative: if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light; if it was sufficiently light for him to see, he might have avoided the staircase, which is a very different thing from a hole or trap-door, through which a person may fall. We think the nonsuit was perfectly right. I am not aware of any question which could have been left to the jury." [WILLES, J. *Farrant v. Barnes*, 11 C. B. N. S. 553, 31 L. J. C. P. 137, is more like this case. There the defendant, being desirous of sending a carboy of nitric acid to Croydon, his foreman gave it to one R., the servant of a railway carrier, who (as the railway company would only carry articles of that dangerous character on one day in each week) handed it to the plaintiff, the servant of a Croydon carrier, without communicating to him (and there was nothing in its appearance to indicate) its dangerous nature. Whilst being carried by the plaintiff, the servant of the carrier, to the cart, the carboy, from some unexplained cause, burst, and its contents flowed over and severely burnt the plaintiff; and this court held that the defendant was liable for the injury thus resulting from his breach of duty.]

Huddleston, Q. C., and *Griffiths*, in support of the rule. The question is whether there was any contract or any duty on the part of the defendant to fence this shoot. The plaintiff was not employed by the defendant to do work on the premises; nor can it be said that he was there with the permission of the defendant: on the contrary, it was distinctly proved that he was there against the will of the defendant's manager. But, assuming that he was there by the permission of the defendant, the defendant was under no obligation to him to fence. For all practical purposes of his business, fencing was unnecessary and objectionable. The premises were shown to have been constructed in the usual way. The mode in which the proposition has been stated, viz., that

here was a danger which was known to the defendant, but of which the plaintiff, to the knowledge of the defendant, was ignorant, is much too narrow: it should exclude the fact that the plaintiff had any reasonable opportunity of knowing of the danger. There could be no more obligation here to fence than there was in *Hounsell v. Smyth*, 7 C. B. N. s. 731; 29 L. J. C. P. 203. [MONTAGUE SMITH, J. The plaintiff was neither invited nor employed there.] The plaintiff here was not invited, neither was he employed by the defendant. He was sent by Duckham in order to ascertain whether the work which had already been completed was so done that his employer could enforce his bargain with the defendant. That clearly gave him no more right than the visitor had in *Southcote v. Stanley*, 1 H. & N. 247, 25 L. J. Ex. 339. The authorities upon this subject are all reviewed in a very learned judgment of Lord Chief Baron Pigot, in a case of *Sullivan v. Waters*, 14 Ir. C. L. R. 460. In an action under Lord Campbell's Act (9 & 10 Vict. c. 93), by the administratrix of P. S., the summons and plaint alleged that before, &c., the defendants were in possession of a certain distillery and lofts and stores connected therewith, and that the said P. S. (deceased) was employed by the defendants as a laborer to do certain work in and about the said distillery at night; that P. S., whilst so employed, had access, by the license of the defendants, to one of the said lofts at night, and by such license used the same for the purpose of sleeping during the intervals of the night when he was not actually engaged in his said employment; yet that the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture, then in the floor of the said loft, to remain open, without being properly guarded and lighted, by reason whereof the said P. S., whilst passing in the night along the floor of the said loft in pursuance of the said license, fell through the said aperture, and was thereby injured, and died: and on demurrer it was held that the summons and plaint disclosed neither a contract nor a duty binding on the defendants to guard or light the aperture in question. After referring to several cases, the learned Chief Baron says: "How far the owner of the premises, who gives to another person license to enter and use them, is answerable for negligence, in not guarding from danger existing on the premises the person to whom he gives such license, is not very clearly defined by the decisions which

have been made on questions of this nature. A distinction seems, however, to have been taken between the case of a person who enters and uses the owner's premises by the owner's express invitation, or as a customer, who, as one of the public, is induced by the owner to come to his premises for the purposes of business carried on by the owner there, on the one side; and, on the other, the case of a mere visitor or guest, invited or uninvited, or of a person who has a mere license to go upon the premises of the owner. The first class of cases comprises those of *Corby v. Hill*, 4 C. B. n. s. 556, 27 L. J. C. P. 318, and *Chapman v. Rothwell*, E., B. & E. 168, 27 L. J. Q. B. 315, to which may be added *Gallagher v. Humphrey*, 6 L. T. n. s. 684. In the second we find *Southcote v. Stanley*, 1 H. & N. 247, 25 L. J. Ex. 339; *Hounsell v. Smyth*, 7 C. B. n. s. 731, 29 L. J. C. P. 203; *Bolch v. Smith*, 7 H. & N. 736, 31 L. J. Ex. 201; and *Wilkinson v. Fairrie*, 1 H. & C. 633, 32 L. J. Ex. 73." And towards the close of his judgment his Lordship says: "This may, I think, be safely laid down as established by the second class of decisions to which I have referred, that a mere license given by the owner to enter and use the premises, which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, creates no such obligation (that is, to guard the licensee against danger) in the owner." [MONTAGUE SMITH, J. The duty is to be implied from the facts.] No duty was implied from the facts which existed in *Wilkinson v. Fairrie*, 1 H. & C. 633, 32 L. J. Ex. 73, and which were quite as strong as the facts here. "As there was no contract," says the Chief Baron, "or any public or private duty on the part of the defendants, that their premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right." [WILLES, J. This is more like *Toomey v. London and Brighton Railway Company*, 3 C. B. n. s. 146, 27 L. J. C. P. 39, where the plaintiff was injured by falling down some steps at a railway station, through a door which he had opened by mistake; and the court held that there was no evidence of negligence to go to the jury.] In *Bolch v. Smith*, 7 H. & N. 736, 31 L. J. Ex. 201, it was held that there was no duty cast by law on a government contractor to fence a shaft crossing a path in a dock-yard, the want of fencing being apparent. *Martin, B.*, there

says: "It is true the plaintiff had permission to use the path. Permission involves leave and license, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right: it is an excuse or license; so that the party cannot be treated as a trespasser." [MONTAGUE SMITH, J. *Wilde, B.*, says: "The danger was open and visible; there was nothing which could be called a trap." Besides, the plaintiff was a workman employed upon the premises.] The utmost that can be said here is that the plaintiff was upon the premises by the same sort of tacit permission as that spoken of by Williams, J., in *Hounsell v. Smyth*, 7 C. B. n. s. 731, 744, 29 L. J. C. P. 203. He was there in the course of doing something for the satisfaction of his employer, Duckham, not on any work for the benefit of the defendant. Or, if he can be said to have been doing work for the defendant, in what does his position differ from that of the supernumerary employed at the theatre, in *Seymour v. Maddox*, 16 Q. B. 326, 20 L. J. Q. B. 327? Erle, J., in that case, says: "A person must make his own choice whether he will accept employment on premises in this condition;" that is, with an unfenced hole in the floor; "and, if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark or carry a light. If he sustain injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted." The decision in *Farrant v. Barnes*, 11 C. B. n. s. 553, 31 L. J. C. P. 137, rests upon this ground, that it is the duty of one who sends a dangerous article by a carrier to inform him of the danger, in order that he may, by using more than ordinary care, avoid it. Willes, J., refers to the shipment, without due notice, of articles liable to spontaneous combustion; a doctrine dealt with in *Williams v. The East India Company*, 3 East, 92, and in *Brass v. Maitland*, 6 E. & B. 470, 26 L. J. Q. B. 49. But how can that principle apply here? *Clarke v. Holmes*, 7 H. & N. 937, 31 L. J. Ex. 356, was the case of unfenced machinery; and there there was abundant evidence of wilful neglect on the part of the defendant. [KEATING, J. The judgment of the Exchequer Chamber in that case proceeded upon the statutes 7 & 8 Vict. c. 15, and 19 & 20 Vict. c. 38, though two of the judges thought the defendant would have been liable by common law.] There

was no misfeasance here on the part of the defendant. The plaintiff was warned of the dangerous character of the premises, or rather of the necessity for great caution in moving about them, before he went there; and a person was sent with a light to show him where to go. It was his own misfortune that he deviated from the safe path. He knew the general nature of the premises, and that more than ordinary care and caution were necessary.

Cur. adv. vult.

Feb. 26. The judgment of the court (ERLE, C. J., WILLES, KEATING, and MONTAGUE SMITH, JJ.) was delivered by

WILLES, J. This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for £400 damages, subject to leave reserved.

A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence.

The rule was argued during the last term, before Erle, C. J., Keating, and Montague Smith, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then, without injury to the business, have been fenced by a rail. Whether it was usual to fence similar shafts when not in use, did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use; and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving; and, for the purpose of ascertaining whether such saving had been effected, the plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident; but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman; and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (*dilectus personæ*), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the color of ingratitude, so long as there is no design to injure him. See *Hounsell v. Smyth*, 7 C. B. N. S. 731, 29 L. J. C. P. 203.

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment and that of a person testing the work which he had stipulated with the

defendant to be paid for if it stood the test, whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable that, in the case of *Southcote v. Stanley*, 1 H. & N. 247, 25 L. J. Ex. 339, upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of. There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver. *Macarthy v. Younge*, 6 H. & N. 329, 30 L. J. Ex. 227. The case of the carboy of vitriol, *Farrant v. Barnes*, 11 C. B. N. s. 553, 31 L. J. C. P. 237, was one in which this court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but he did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour v. Maddox*, 16 Q. B. 326, 20 L. J. Q. B. 327, also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not, however, including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury are held to be only elements in

determining whether there has been contributory negligence : how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Clarke v. Holmes*, 7 H. & N. 937, 31 L. J. Ex. 356.

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop : but it is obvious that this is only one of a class ; for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced and unlighted. *Lancaster Canal Company v. Parnaby*, 11 Ad. & E. 223, 3 P. & D. 162 ; *per cur.*, *Chapman v. Rothwell*, E. B. & E. 168, 27 L. J. Q. B. 315, where *Southcote v. Stanley*, 1 H. & N. 247, 25 L. J. Ex. 339, was cited, and the Lord Chief Justice, then Erle, J., said : “ The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant.” This protection does not depend upon the fact of a contract being entered into in the way of the shop-keeper’s business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shop-keeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shop-keeper, and as much entitled to protection during this accessory visit, though it might not be for the shop-keeper’s benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same con-

sideration as the master. The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

'And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger [of] which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson v. Fairrie*, 1 H. & C. 633, 32 L. J. Ex. 73, relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case: first, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved that, when the shaft was not in use, a fence might be resorted to without inconvenience; and no usage could establish that what was in fact necessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft

unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it: and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be, that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed; and, as every reservation of leave to enter a nonsuit carries with it an implied condition that the court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved, — in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was there near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at Chambers.

As to the motion to arrest the judgment, for the reasons already given, and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit. The other arguments for the defendants, to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence: but it would be wrong to grant a new trial without a reasonable expectation that another jury might take a different view of the facts; and, as the Lord Chief Justice does not express any dissatisfaction with the verdict, the rule upon this, the only remaining ground, must also be discharged. *Rule discharged.*

Attorneys for plaintiff, *Sturney & Diggles*. Attorney for defendant, *G. Henderson*.

The case was now carried by appeal to the Exchequer Chamber, where the judgment above pronounced was affirmed. Law R. 2 C. P. 317. The opinion of the court was delivered by

KELLY, C. B., who, after quoting from and adopting the opinion of Willes, J., *supra*, that the plaintiff was not a licensee, said : The question has been raised whether the plaintiff at the time of the accident, and under the special circumstances of the case, was more than a mere volunteer. Let us see what the case really was. The work had been done on Saturday, and at the conclusion of it an appointment was made for the plaintiff's employer or some other workman to come on the following Tuesday to see if the work was in proper order, and all the parts of it acting rightly. The plaintiff, by his master's directions, went for that purpose, and I own I do not see any distinction between the case of a workman going upon the premises to perform his employer's contract, and that of his going after the contract is completed, but for a purpose incidental to the contract, and so intimately connected with it that few contracts are completed without a similar act being done. The plaintiff went under circumstances such as those last mentioned, and he comes therefore strictly within the language used by Willes, J., "a person on lawful business in the course of fulfilling a contract in which both the plaintiff and defendant have an interest." What, then, is the duty imposed by law on the owner of these premises? They were used for the purpose of a sugar refinery; and it may very likely be true that such premises usually have holes in the floors of the different stories, and that they are left without any fence or safeguard during the day while the work-people, who it may well be supposed are acquainted with the dangerous character of the premises, are about; but if a person occupying such premises enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him. That view was taken in the judgment below, where it is said, "With respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to

expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger [of] which he knows or ought to know ; and that when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

It was so determined in this case ; and, though I am far from saying that there was not evidence that the plaintiff largely contributed to the accident by his own negligence, yet that was for the jury ; and I think there was clearly some evidence for them that the defendant had not used reasonable precautions, and that the judge therefore would have been wrong if he had non-suited the plaintiff.

CHANNELL, B., BLACKBURN, J., MELLOP, J., and PIGOTT, B., concurred.

Judgment affirmed.

ROBERTS v. SMITH and Another.

(2 Hurl. & N. 218. Exchequer Chamber, England, Easter Vacation, 1857.)

A declaration stated that the plaintiff, a bricklayer, entered into the service of the defendants upon the terms that they should take and use all due, reasonable, and proper means and precautions in order to prevent accident, damage, or injury, or unreasonable or unnecessary risk, or damage from happening or occurring to the plaintiff in the performance of his duty as such servant ; that the defendants did not take such reasonable precautions, and by reason thereof, and of the neglect of duty of the defendants, the plaintiff was employed on a scaffold which, for want of such precautions, was rotten and unsafe, which the defendants knew, and whereof the plaintiff was wholly ignorant, and in consequence thereof a part of the scaffold broke, and the plaintiff fell to the ground. Pleas, — first, not guilty ; second, traverse of employment on the terms alleged. At the trial, it was proved that the defendants had employed a laborer to erect the scaffold. The materials for the scaffold were in bad condition. The laborer broke several of the putlogs in trying them. One of the defendants told him to break no more ; that the putlogs would do very well. The laborer used such as he thought sound. One of the putlogs so used having given way, the scaffold fell, and the plaintiff was injured. On this evidence, the judge at the trial directed a nonsuit. *Held*, on appeal to the Court of Exchequer Chamber, that there was evidence to go to the jury of the liability of the defendants.

DECLARATION: That before, and until, and at the time of the plaintiff's entering into the service of the defendants, and of the committing of the grievances, &c., the defendants carried on the business of builders, and the plaintiff, being a bricklayer, entered into the service of the defendants in the way of their trade, upon the terms and conditions, amongst others, that the defendants should take and use all due, reasonable, and proper means and precautions in order to prevent accident, damage, or injury, or unreasonable and unnecessary risk or danger from happening or occurring to the plaintiff, in the performance of his duty as such servant of the defendants; and, although the plaintiff did all things, &c., yet the defendants did not take or use due, or reasonable, or proper means or precautions, but altogether omitted so to do; and by reason thereof, and of the default and neglect of duty of the defendants, the plaintiff was directed and employed by the defendants, as such their servant, to perform work upon the wall of a house, and for that purpose to remain at a great height from the ground upon a scaffold, affixed to such house, and which scaffold, for want of the use of such means or precautions, and by reason of the negligence and default of the defendants, was and remained constructed very unsafely and unsecurely, and in such a defective, rotten, and improper state and condition as to render it dangerous to remain upon the same for the purpose of doing the work, which the defendants then well knew, but whereof the plaintiff was wholly ignorant; and in consequence thereof, whilst the plaintiff was so engaged and employed, a part of the scaffold broke and gave way, and the plaintiff was precipitated to the ground, and his thigh was thereby fractured, &c. Pleas,—first, not guilty; second, traverse of the employment upon the terms alleged. Issues thereon.

The case was tried before Pollock, C. B., at the sittings at Westminster, after last Michaelmas Term, when the following evidence was given for the plaintiff:—

The plaintiff stated that he was a bricklayer in defendants' employment. On the 16th of July, in consequence of the breaking of a putlog, the plaintiff was precipitated from a scaffold into the area, and broke his thigh. Another witness, a laborer, said: "I was employed to get the scaffolding out of the defendants' yard, and to erect the same. It is usual to examine the poles, &c. I examined the materials, and found them in bad condition,

light, and worm-eaten. I broke severa' that were light and worm-eaten. The defendant, William Smith, came afterwards; he asked who broke the putlogs; I told him I did. Smith then said, 'You have no business to do so; they will do very well, as there are no bricks or mortar to be put upon them; don't break any more.' I put aside such as I thought sound. I used three putlogs where one would have done. I have been a laborer and scaffolder for twenty-five years. A sound putlog ought to bear from 15 cwt. to a ton, or twenty men." Another witness, on cross-examination, stated, "The putlog which broke was the strongest of the three; I thought it was safe for the weight which was going on it." Other witnesses stated that the putlogs and poles were both rotten. At the conclusion of the plaintiff's case, it was objected that there was no evidence to go to the jury; and on that ground the Lord Chief Baron directed a nonsuit, with liberty to the plaintiff to move for a new trial, if there was any evidence to go to the jury.

A rule was afterwards obtained by the plaintiff, calling upon the defendants to show cause why the nonsuit should not be set aside, and a new trial had, on the ground that the evidence ought to have been left to the jury. It was agreed between the plaintiff's and the defendants' counsel (in order that the plaintiff might appeal) that this rule should be discharged by the Court of Exchequer, and against such ruling this appeal was brought.

Temple, with whom was *C. Wray Lewis*, for the plaintiff, now moved for a new trial. The accident was caused by the improper conduct of the defendant Smith, who prevented the servant whom he had employed to erect the scaffold from trying the strength of the putlogs which he was about to use. The principle which governs these cases is laid down in *Paterson v. Wallace*, 1 Macqueen, 748. This was an action against the owners of a mine by the family of a workman, who was killed in the mine by the falling of a stone. It was proved that one Snedden was the underground manager of the mine; that there was some dispute about not going to work on the day when the accident happened, when the workmen pointed to the roof, and particularly to the stone, which afterwards fell, as being in a very dangerous condition. Snedden said they were afraid of snow when none fell. The deceased remonstrated, and Snedden ultimately agreed that the stone should be removed. The deceased, not waiting for the

removal, passed under the stone, and was killed by its falling. Lord Cranworth, C., said that it was necessary for the pursuers to establish two propositions: first, that the stone was in a dangerous position, owing to the negligence of the master; and, next, that the workman whose life was forfeited lost it by reason of that negligence, and not of any rashness on his own part. He also laid down the rule, "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. . . . It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch or secure, when, in fact, the master knows, or ought to know, that it is not so; and if, from any negligence in this respect, damage arise, the master is responsible." This ruling was confirmed in the case of *Brydon v. Stewart*, 2 Macqueen, 30. If it had been proved that every putlog was in a rotten state, that might have been evidence for the jury that reasonable care had not been taken by the master. Here, however, there was express evidence of recklessness on the part of the master. [COCKBURN, C. J. It is clear that there was evidence to go to the jury that the accident was caused by the negligence of the master; the question is, not whether the master believed the putlogs sufficiently strong, but whether he was justified in believing them so.]

Knowles, with whom was *Barnard*, for the defendants, showed cause. The declaration alleges that the plaintiff entered into the service of the defendants, upon the terms that they should use all due means and precautions in order to prevent accident or injury, or unreasonable or unnecessary risk or damage from happening to the plaintiff in the performance of his duty as a servant. Now, the law casts no duty upon a master in a case like the present, except that of taking due care in selecting his servants. [COCKBURN, C. J. Suppose he employs competent servants, but gives them materials that are rotten, and cannot safely be used. WIGHTMAN, J. Suppose that he does so knowing the materials to be rotten.] The only duty is to take reasonable care in providing proper materials and servants. [CROMPTON, J. The allegation means no more than that the defendant was to do all that the law required of him.] In *Seymour v. Maddox*, 16 Q. B. 326, it was held that the owner of a theatre was not liable for injury to an actor, who fell through a hole in the floor, under the

stage, which was not lighted or fenced. [ERLE, J. In that case the arrangement was an indispensable part of the stage mechanism.] In *Tarrant v. Webb*, 18 C. B. 797, certain scaffolding had been erected by a servant of the defendant, named Martin. Some painters employed said it wanted an additional upright; and the defendant said that, if Martin hearkened to the painters, he would have nothing else to do. The accident having occurred for want of the additional upright, Crowder, J., told the jury that if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover. The jury, having found a verdict for the plaintiff, intimating that Martin was not a competent person, the court granted a new trial. [CROMPTON, J. That part of the ruling of my brother Crowder which applies to this case is against the defendants. COCKBURN, C. J. There the plaintiff sought to make the master responsible for the negligence of the servant. Here it was the master who was himself guilty of negligence. CROWDER, J. The master there had nothing to do with the scaffolding.]

COCKBURN, C. J. We are all of opinion that there must be a new trial, and that it was quite clear that there is evidence to go to the jury.

WILLES, J. It must be understood that this rule is granted upon the ground that there appears to have been evidence of the personal interference and negligence of the master.

Rule absolute for a new trial.

NICHOLAS FARWELL v. THE BOSTON AND WORCESTER RAILROAD CORPORATION.

(4 Met. 49. Supreme Court, Massachusetts, March Term, 1849.)

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in con-

sequence of the carelessness of another while both are engaged in the same service.

A railroad company employed A., who was careful and trusty in his general character, to tend the switches on their road; and, after he had been long in their service, they employed B. to run the passenger train of cars on the road, B. knowing the employment and character of A. *Held*, that the company were not answerable to B. for an injury received by him, while running the cars, in consequence of the carelessness of A. in the management of the switches.

IN an action of trespass upon the case, the plaintiff alleged in his declaration that he agreed with the defendants to serve them in the employment of an engineer in the management and care of their engines and cars running on their railroad between Boston and Worcester, and entered on said employment, and continued to perform his duties as engineer till October 30, 1837, when the defendants, at Newton, by their servants, so carelessly, negligently, and unskilfully managed and used, and put and placed the iron match rail, called the short switch, across the rail or track of their said railroad, that the engine and cars, upon which the plaintiff was engaged and employed in the discharge of his said duties of engineer, were thrown from the track of said railroad, and the plaintiff, by means thereof, was thrown with great violence upon the ground; by means of which one of the wheels of one of said cars passed over the right hand of the plaintiff, crushing and destroying the same.

The case was submitted to the court on the following facts agreed by the parties: "The plaintiff was employed by the defendants, in 1835, as an engineer, and went at first with the merchandise cars, and afterwards with the passenger cars, and so continued till October 30, 1837, at the wages of two dollars per day, that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed.

"On the 30th of October, 1837, the plaintiff, then being in the employment of the defendants, as such engine-man, and running the passenger train, ran his engine off at a switch on the road, which had been left in a wrong condition (as alleged by the plaintiff, and, for the purposes of this trial, admitted by the defendants) by one Whitcomb, another servant of the defendants, who had been long in their employment, as a switchman or tender, and had the care of switches on the road, and was a careful and trustworthy servant, in his general character, and as

such servant was well known to the plaintiff; by which running off, the plaintiff sustained the injury complained of in his declaration.

"The said Farwell (the plaintiff) and Whitcomb were both appointed by the superintendent of the road, who was in the habit of passing over the same very frequently in the cars, and often rode on the engine.

"If the court shall be of opinion that, as matter of law, the defendants are not liable to the plaintiff, he being a servant of the corporation, and in their employment, for the injury he may have received from the negligence of said Whitcomb, another servant of the corporation, and in their employment, then the plaintiff shall become nonsuit; but if the court shall be of opinion, as matter of law, that the defendants may be liable in this case, then the case shall be submitted to a jury upon the facts which may be proved in the case; the defendants alleging negligence on the part of the plaintiff."

C. G. Loring, for the plaintiff. *Fletcher & Morey*, for the defendants.

SHAW, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, — that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise the

servant shall answer for his own misbehavior. 1 Bl. Com. 431; *M'Manus v. Crickett*, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law, — like that of a common carrier,

to stand to all losses of goods not caused by the act of God or of a public enemy, or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests, — it would be a rule of frequent and familiar occurrence; and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. *Priestley v. Fowler*, 3 Mees. & Welsb. 1; *Murray v. South Carolina Railroad Company*, 1 McMullan, 385.

The general rule resulting from considerations as well of justice as of policy is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. *Copeland v. New England Marine Ins. Co.*, 2 Met. 440-443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems

to be a good authority for the point that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited: a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier; and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590 *et seq.*

We are of opinion that these considerations apply strongly to

the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment ; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed ; and, like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default, of which we give no opinion.

It was strongly pressed in the argument that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same,

and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair, and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and

suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and, if so, it must be on the ground that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract, and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent in case of an incorporated company — are questions on which we give no opinion. In the present case the claim of the plaintiff is not put on the ground that the

defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred by which the plaintiff sustained a severe loss.

It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.

Persons (not servants) injured while on Defendant's Premises.—*Sweeny v. Old Colony & N. R. Co. and Indermaur v. Dames* have settled the distinction between the duty which a man owes to persons who come upon his premises as bare volunteers or licensees, and those who come as customers or otherwise in the course of business, upon the invitation, express or implied, of the occupier. As to the latter, the occupier is bound to exercise reasonable care to prevent damage from unusual danger, of which the occupier has or ought to have knowledge; and this, though the transaction had already been completed, and the plaintiff had returned only for some incidental (if proper and usual) purpose connected with it. As to the former, the party takes his own risk; and, so long as there is no active misconduct towards him, no liability is incurred by the occupier of the premises by reason of injury sustained by a visitor on his premises.

But the rule is not always so easily applied as stated. Who are licensees or volunteers, and who are customers, using each of these words in the broad sense, as including all who take their own risk, and all to whom the duty of warning belongs?

Upon careful examination of the above and other cases, however, it will be found that the authorities may be classed under three heads, to wit:—

1. Bare licensees or volunteers.
2. Those who are expressly invited or induced by the active conduct of the defendant to go upon his premises.
3. Customers and others who go there on business with the occupier.

The general rule will then be that in those cases which fall under the first head the party injured has no right of action against the occupant of the premises; and the contrary in cases falling under the second and third heads. But each of these classes requires further examination.

As to bare licensees and volunteers, or even voluntary trespassers, it is by no means true that an action will never lie against the occupant. It has been held in England, in a series of cases beginning with *Bird v. Holbrook*, 4 Bing. 628, s. c. 1 Moore & P. 607, that where the defendant has been guilty of an inhuman (though possibly not indictable) act, as the setting of a spring gun in his premises without notice, for the express purpose of "catching a man,"—one who has voluntarily strayed upon the premises, and been injured by the dangerous engine, may maintain an action for the damage sustained. If, however, the plaintiff had notice of the existence of the dangerous thing, he cannot recover. *Ilott v. Wilks*, 3 Barn. & Ald. 308. See also *Deane v. Clayton*, 7 Taunt. 518; *Lynch v. Nurdin*, 1 Q. B. 37; *Jordin v. Crump*, 8 Mees. & W. 782; *Barnes v. Ward*, 9 Com. B. 392, 420; *Johnson v. Patterson*, 14 Conn. 1; *Birge v. Gardiner*, 19 Conn. 507; all approving the doctrine of *Bird v. Holbrook*.

A fortiori, if the plaintiff in such a case as *Bird v. Holbrook* were not guilty of fault, albeit he were a bare licensee. See *Collis v. Selden*, Law R. 3 Com. P. 495, where it was conceded, in an action against a gas-fitter for negligence in hanging a chandelier, whereby the plaintiff, apparently a licensee on the premises, was injured, that if the defendant had known of the defective hanging, he would have been liable.

Nor is it true that a bare licensee can never recover for injury sustained where the defendant has not been guilty of some great wickedness. If the act of the defendant amounts to a public nuisance, and the plaintiff has suffered special damage thereby, he may recover

in some cases, though the damage was sustained by reason of his going upon the defendants's premises, if his going there was accidental or without intention. *Barnes v. Ward*, 9 Com. B. 392.

The contrary, apparently, has been held in Massachusetts, but we apprehend upon an incomplete view of the subject. *Howland v. Vincent*, 10 Met. 371. In this case the plaintiff had been injured by falling in the night-time into a hole dug by the defendant in his premises. This hole, which had been dug for the purpose of cellar rooms for the defendant's hotel, extended to within a foot and a half of the line of the highway, along which the plaintiff was lawfully passing at the time. It was agreed that the plaintiff had been free from negligence; but it was held that she could not recover. The act of the defendant, it was said, was lawful; it had been done without negligence; and, though the public may have been permitted to pass over the vacant space before the hole was dug, yet they had acquired no rights thereby. And this license had been lawfully revoked.

But the learned court overlooked what would seem to be an answer to this otherwise sound position; to wit, that the defendant, by digging the hole so near the highway and leaving it exposed as it was, had constructed a public nuisance. (*Comp. Murphy v. Brooks*, 109 Mass. 202.) This was the ground upon which *Barnes v. Ward*, *supra*, a very similar case, was decided. The learned judge at *nisi prius* had told the jury that if there was a public way abutting on the area, and it would be dangerous to persons passing, unless fenced, or if there was a public way so near that it would produce danger to the public unless fenced, the defendant would be liable, unless the accident was

occasioned by want of ordinary caution on the part of the deceased. The jury having found a verdict for the plaintiff, a motion to set the same aside for (*inter alia*) misdirection was now made. The case was twice elaborately argued, and the motion finally overruled. "In the present case," said Mr. Justice Maule, in delivering judgment, "the jury expressly found the way to have existed immemorially; and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way at the time the accident happened. The result is, — considering that the present case refers to a newly made excavation adjoining an immemorial way, which rendered the way unsafe to those who used it with ordinary care, — it appears to us, after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway."

The doctrine of this case has often been approved. In *Hardcastle v. South Yorkshire Ry. Co.*, 4 Hurl. & M. 67, the plaintiff's intestate was drowned by walking into a reservoir. The declaration alleged that the defendants were possessed of land *near to* and adjoining an ancient common and public footway, and had constructed a certain large reservoir, hole, or dam, in and upon their said land *within a short distance* of the said footway, and filled

the same with water; the existence of the said reservoir so adjoining the footway being dangerous to persons passing along the way by night or by day, even if ordinary caution were employed. Whereby it became the duty of the defendants to properly guard the place; but, failing in the same, the deceased had missed his path, and had fallen into the reservoir. The evidence showed that the reservoir was near, but not adjoining the footway; and it was held that the plaintiff could not recover. Referring to *Barnes v. Ward*, *supra*, the court observed that the doctrine that a private injury arising from a public nuisance is subject-matter of an action for damages was as old as the common law, and that if they were of opinion that the state of the reservoir was a nuisance to the footpath, and that the plaintiff was substantially in the right, they would be desirous to aid the plaintiff; but they were of opinion she had no right of action. "When an excavation," continued the court, by Pollock, C. B., "is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage-way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land *before he reached it*, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent; and if the question be for the jury, no one could tell whether he was

liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise, — if, in every case, it was to be left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous."

In *Hounsell v. Smyth*, 7 Com. B. N. s. 731, the declaration alleged that the defendants were seized of certain waste land upon which was a quarry that was worked by a person, subject to the payment of certain royalties to the defendants; that this waste land was unenclosed and open to the public, and that all persons having occasion to pass over the waste had been used and accustomed to go upon and across the same without interruption or hindrance from, and with the license and permission of, the owners of the waste; that the quarry was situate near to and between two public highways leading over the waste, and was precipitous and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one such road to the other, beside or near the quarry; that the defendants, knowing the premises, negligently and contrary to their duty left the quarry unfenced, and took no care and used no means for protecting the public or any person so accidentally deviating from the said roads, or passing over the waste, from falling into the quarry; and that the plaintiff, having occasion to pass along one of the said roads, and having, by reason of the darkness of the night, accidentally taken the wrong road, was crossing the waste for the purpose of getting into the other, and,

not being aware of the existence or locality of the quarry, and being unable by reason of the darkness to perceive the same, fell in, and was injured. On demurrer, it was held that the declaration disclosed no cause of action. Mr. Justice Williams said that the allegations, aside from that of use and license, amounted to no more than this, that there was a pit or quarry upon the waste somewhere between two public roads, — not so near to either as to constitute a public nuisance, but so near as to be dangerous, not to persons passing along either of the public ways, but to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from the one road to the other. This state of things gave no right of action, unless it were shown that the excavation was so near the road as to amount to a public nuisance, which was not charged. And the allegation of user and license, the learned judge observed, had added nothing to the declaration, because it did not imply any substantive right. "Suppose the owner of land near the sea," said he, "gives another leave to walk on the edge of a cliff, surely it would be absurd to contend that such permission cast upon the former the burden of fencing. Can it make any difference that there is a public highway open to, but at some distance from, the cliff?"

Both of the above cases were decided partly upon the authority of *Blyth v. Topham*, Croke Jac. 158, where it was held that if A., seized of a waste adjacent to a highway, digs a pit within thirty-six feet of the highway, and the mare of B. escapes into the waste, and falls into the pit, and dies there, yet B. shall not have an action

against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B. But it was the default of B. himself that his mare escaped into the waste.

In *Dinks v. South Yorkshire Ry. Co.*, 3 Best & S. 244, it appeared that the defendants had constructed a canal by the side of an ancient public footway, at a distance of more than twenty feet from it, with a tow-path on the bank of the canal and an intermediate space; and, in consequence of acts of persons authorized by the company, the distinction between the footway and the canal had become obliterated. It also appeared that, though the public had no right to pass over the space between the footway and the canal, they were permitted by the defendants to do so. The plaintiff's intestate had, in passing along the way, quitted the footpath, and, in consequence of the dangerous state of the canal, had fallen in and been drowned. It was held that these facts disclosed no cause of action against the proprietors of the canal; the doctrine of the above cases being reaffirmed. Blackburn, J., said: "I do not think it is possible, on the evidence here, to say that this canal was adjoining to the highway originally. There was an intervening breadth of towing-path of about nine feet, and a strip of grass, which was agreed to be a marked and real distinction." And as to the state of the canal, he said: "In order to distinguish this case from that to which I have referred [*Hardcastle v. South Yorkshire Ry. Co.*, *supra*], it was argued that such alterations had been made in the towing-path that they obliterated the distinction between it and the footway, and so rendered it not noticeable, especially at night, and consequently dangerous. But I do not think that

that amounts to making the canal adjoin the footway, if it did not do so before." The acts of the defendants, he added, did not amount to an *inducement* to the public to quit the footway.

In *Bolch v. Smith*, 7 Hurl. & N. 786, it appeared that the plaintiff was a workman in a government dockyard, and the defendant a contractor there. There were water-closets in the yard for the use of the workmen, to which several paths led. Across one of these paths the defendant had by proper permission placed certain machinery for the purposes of his work; and this machinery he had partly covered with planks. The plaintiff, in going along this path to the water-closet, had stumbled, and, putting his hand out to save himself, his arm was caught in the machinery and lacerated. The court ruled that he could not recover. "On full consideration," said Channell, B., "I am clearly of opinion that the defendant was under no obligation to fence the shaft. The case falls within the law as explained in *Hounsell v. Smyth*. We must assume that the plaintiff was not a trespasser, and that he was using the road with the permission of the owners of the soil; but he was not obliged to use it, for there were two other ways to the same place, though less convenient. *Corby v. Hill*, 4 Com. B. N. s. 556, is to my mind distinguishable. In that case permission was given to the defendant to place materials on a private road, and the plaintiff, as one of the public, had a right to use the road on which the defendant had placed a quantity of slates." As to the argument that, the defendant having undertaken to fence, he should have done so securely, the learned baron said that there might be force in such an argument if the insuf-

iciency of the fence had not been apparent. It would then have come within the observations of Mr. Justice Willes in *Corby v. Hill*. See also *Cornman v. Eastern Counties Ry. Co.*, 4 Hurl. & N. 781.

In Connecticut, where there is a statutory duty resting upon municipal corporations to protect travellers against the dangers of excavation along the highway, it is held that where a city has been compelled to pay damages by reason of a failure to perform this duty, the city may recover over against the party in charge of the obstruction upon proof of his neglect to take the precaution required of the city before the city authorities had had an opportunity to attend to the same; and this, too, without regard to the distance of the excavation from the highway, provided it endangered travel thereon. *Norwich v. Breed*, 30 Conn. 535. Although the court in this case profess to reject the rigid test of liability of the English cases, supposing that test to depend upon distance from the highway, there is probably little or no real difference between the two rules. It is hardly to be supposed that the English courts mean to prescribe for every case a limit of distance; to wit, that the dangerous place must actually adjoin the highway. The language above quoted from the opinion of Pollock, C. B., in *Hardcastle v. South Yorkshire Ry. Co.* (which is quoted and adopted by Keating, J., in *Hounsell v. Smyth*), clearly implies the contrary. The question as he puts it requires that the person injured must have become "a trespasser upon the defendant's land before he reached" the excavation, in order to excuse the occupier. That is, the former must have rendered himself liable to an action for trespass before

he sustained the injury; provided at the same time the excavation is a public nuisance. (He did not mean, of course, that if a man's horse, in running away with him, should rush through an open field and precipitate him into a pit far from the highway, the land-owner would be liable.) This being taken in connection with the established principle that the liability of the occupier depends upon his having constructed a public nuisance upon his premises, — i.e., something preventing the public from using the highway as freely and fully as before, — it is evident that the matter of distance cannot as a test be adequate for all cases.

See, further, *Coupland v. Hardingham*, 3 Campb. 398; *Jarvis v. Dean*, 3 Bing. 447; s. c. 11 J. B. Moore, 354; *Jordin v. Crump*, 8 Mees. & W. 782; *Gautret v. Egerton*, Law R. 2 Com. P. 371; *Knight v. Ebert*, 6 Barr. 472; *Roulston v. Clark*, 3 E. D. Smith, 366; *Illinois Cent. R. Co. v. Carraher*, 47 Ill. 333.

So much for the first class of cases; namely, bare licensees. Let us now consider the second class; namely, those who are expressly invited or induced by the active conduct of the defendant to go upon his premises.

To this class of cases belongs the principal case, *Sweeny v. Old Colony & N. R. Co.* The doctrine of this authority is that where the plaintiff has been induced by the active conduct of the defendant (at the time?) to go upon the latter's premises, he will be liable for injury there sustained by the former, in case of the neglect of reasonable care to protect him from danger. See also *Elliott v. Pray*, 10 Allen, 378. And if this be true, in a case where the conduct of the defendant has induced the plaintiff to go upon his premises, it must be

true *a fortiori* where the defendant has expressly, *i. e.*, by word of mouth, invited the plaintiff.

Upon the latter point we must particularly notice the well-known case of *Southcote v. Stanley*, 1 Hurl. & N. 247. The declaration alleged that the defendant was possessed of a hotel into which he had *invited* the plaintiff to come as a *visitor*; that in the hotel there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the house; and that the plaintiff, by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened the same for the purpose aforesaid, as a door which was in a proper condition to be opened. Nevertheless, by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition, and unfit to be opened, by reason whereof a large piece of glass fell from the door and wounded the plaintiff. On demurrer, it was held that the declaration disclosed no cause of action. The learned Chief Baron rested his opinion on the ground that the plaintiff, not being a guest, could not be in a more favorable situation than a servant, who, he affirmed, would have no right of action against his master in such case; referring to the *dicta* of *Priestley v. Fowler*, 3 Mees. & W. 1, a case to be noticed hereafter. Mr. Baron Bramwell based his opinion upon the ground that no act of *commission* had been alleged. Mr. Baron Alderson simply concurred in the judgment, without giving his reasons.

The decision was right, and is consistent with the principle above stated, for several reasons. First, it is to be observed that the statement that the plaintiff was "invited" into the hotel is

made in a declaration, in which case, on a demurrer, words of a vague sense are to be construed against the plaintiff. And the words "invited" and "visitor" are consistent with the character of (what the plaintiff probably was, else the language would have been stronger) a mere caller. Indeed, the plaintiff's argument shows that the allegation was merely intended to show that the plaintiff was *lawfully* in the hotel. "Whether it be a private house or a shop," said counsel for the plaintiff, "a duty is so far imposed on the occupier to keep it reasonably secure that if a person *lawfully* enters," &c. "Here it is alleged that the defendant invited the plaintiff to come into the hotel as a visitor; that shows that he was lawfully there." Secondly, there was no allegation that the defendant *knew* of the insecure condition of the door; and it is a well-settled principle that, in order to make a man liable for damages sustained by reason of the insecure or ruinous condition of his premises, it must appear that he had notice of such condition. *Welfare v. London & B. Ry. Co.*, Law R. 4 Q. B. 693. Thirdly, there was no allegation of any misfeasance, or "act of commission," to use the language of *Bramwell, B.* It was not alleged that the plaintiff had *put* the glass of the door in insecurely. It was consistent with the allegation that "through the mere carelessness, negligence, and default of the defendant the door was then in an insecure and dangerous condition," that the glass had become gradually loosened by constant use of the door, and that the defendant had had no notice of the fact. Had the plaintiff been a guest, it would have been no defence that the landlord had not been guilty of a misfeasance in respect of the door. So, too, if the

injury had been committed in a public highway, that would have been no defence. See *ante*, pp. 598, 599.

The person making the invitation must of course have authority so to do. *Eaton v. Delaware, &c., R. Co.*, 57 N. Y. 382.

The third class of cases — the entry of customers on business — is well illustrated by *Chapman v. Rothwell*, El., B. & E. 168. This was a demurrer to a declaration. The allegation was that the defendant was in occupation of a brewery and office and a passage leading thereto from the public street, used by the defendant for the reception of customers in his trade as a brewer, which passage was the usual means of access from the office to the street. Yet the defendant wrongfully and negligently permitted a trap-door in the floor of the passage to be and remain open, without being properly guarded and lighted; and the plaintiff's wife, who had gone to the office as a customer of the defendant and otherwise in the defendant's business, and was lawfully passing along the said passage on her return from the office to the street, fell through the opening, and was killed. It was held that the declaration disclosed a good cause of action. On *Southcote v. Stanley*, *supra*, being cited, Erle, J., said: "The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant."

Freer v. Cameron, 4 Rich. 228, was a similar case. The defendants' clerk took a customer into a dark part of their store, and while there she fell through a trap-door, which had been negligently left open, and was injured;

and it was held that the defendants were liable. See also *Ellicott v. Pray*, 10 Allen, 378; *Zoebisch v. Tarbell*, ib. 385; *Karl v. Maillard*, 3 Bosw. 591; *Pickard v. Smith*, 10 Com. B. N. s. 470.

In *Carleton v. Franconia Iron Co.*, 99 Mass. 216, the plaintiff brought an action of tort for an injury to his vessel. The defendants were owners of a wharf, and had procured the plaintiff to bring his vessel to it to be there discharged of its cargo, and suffered the vessel to be placed there, at high water, over a rock sunk and concealed in the adjoining dock. The defendants were aware of the position of this rock, and of its danger to vessels; but no notice thereof had been given. With the ebb of the tide, the vessel settled down upon the rock, and sustained the injury complained of; and for this the plaintiff was held entitled to damages. Mr. Justice Gray, in delivering the opinion of the court, stated the rule thus: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given them no notice of." The learned judge referred to *Wendell v. Baxter*, 12 Gray, 494, where the proprietors of a wharf, established for the use of the public, were held liable for an injury resulting from a defect in its surface, whether occasioned by the action of the sea or by other causes, which they by the exercise of ordinary care and diligence could have provided against, to a person rightfully on the wharf with his horse

and cart for the purpose of carrying mail-bags from a steamboat to the post-office. *Parnaby v. Lancaster Canal Co.*, 11 Ad. & E. 223, s. c. 3 Nev. & P. 523, 3 Per. & D. 162; *Gibbs v. Liverpool Docks*, 3 Hurl. & N. 164, s. c. *sub nom.* *Mersey Docks v. Gibbs*, 11 H. L. Cas. 687, Law R. 1 H. L. 93; and *Thompson v. North-eastern Ry. Co.*, 2 Best. & S. 106 — were also cited as similar cases.

The opinion of the court in the above case of *Carleton v. Franconia Iron Co.* upon the point of the ownership of the soil of the dock in which the rock lay is important, and we reproduce it. "It does not indeed appear," said the court, "that the defendants owned the soil of the dock in which the rock was imbedded; but they had excavated the dock for the purpose of accommodating vessels bringing cargoes to their wharf, and such vessels were accustomed to occupy it, and could not discharge at that point of the wharf without doing so. It is immaterial in this case whether the danger had been created or increased by the excavation made by the defendants, or had always existed, if they, knowing of its existence, neglected to remove it or to warn those transacting business with them against it. Even if the wharf was not public but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners or their agents or servants, was put in a place apparently adapted to its reception, but known by the defendants to be unsafe. This case cannot be distin-

guished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the travelled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway." See further, as to wharf-owners, *Pittsburgh v. Grier*, 22 Penn. St. 54.

As to this third class of cases, unless the plaintiff comes also under the second class, by being induced by the defendant to come upon the premises, it must be observed that, in order to recover for injuries sustained, he must have gone upon the premises for business with the occupier. This appears from *Southcote v. Stanley*, and from *Collis v. Selden*, *supra*. There was nothing to show in either case that the plaintiff's business was with the proprietor or occupant of the premises; and it is doubtless part of the plaintiff's case to allege and prove that he went upon the premises on account of business with the defendant. See *Carleton v. Franconia Iron Co.*, *supra*; *Tebbutt v. Bristol & E. Ry. Co.*, Law R. 6 Q. B. 73, 75; *Axford v. Prior*, 14 Week. R. 611.

But this is not enough. A man has no right to intrude himself upon another, even for purposes of business. The business which will justify an entry upon the premises, in the absence of an express invitation, or an engagement for services, must be the ordinary business of the occupant, not that of the plaintiff. The ground of liability in such cases is that of an implied invitation; and an invitation can only be

implied when the entry is made in connection with the defendant's business. A dealer in goods impliedly invites the public to come in and buy; and one who enters his store in accordance with such invitation is entitled to the reasonable protection spoken of in the cases; otherwise, not.

It may, therefore, well be doubted whether one who is drawn into a shop, for instance, out of mere curiosity, can be considered a customer within the meaning of the rule. But *quære*, if the plaintiff entered the defendant's place of business, in the usual manner, to present a bill due by the defendant, whether he would not be entitled to protection?

It is hardly necessary to add that this duty owing to the customer extends to all parts of the defendant's premises and their appurtenances to which the customer has need of access in the prosecution of the business. See *Smith v. London Docks Co.*, Law R. 3 Com. P. 326, where the plaintiff was injured while going over a gangway which the defendants had provided for the passage from their dock to vessels lying adjacent. The gangway was in an insecure position to the knowledge of the defendants, but not to the knowledge of the plaintiff; and it was held that the defendants were liable.

So, too, the defendant may be liable where the business was not transacted by the plaintiff in the usual way or place, provided he could not so do it with convenience, and was not prohibited from doing it as he did; the defendants, or their servants, seeing him at the time. The plaintiff is not a licensee in such case. *Holmes v. North-eastern Ry. Co.*, Law R. 4 Ex. 254; s. c. Law R. 6 Ex. 123.

But where the accident happened

not by reason of any abnormal condition of the defendant's premises, but by a fall down an ordinary stairway, it is not necessary for the defendant to give notice of the existence of the place where danger may happen. *Wilkinson v. Fairrie*, 1 Hurl. & C. 638.

Servants injured on Masters' Premises.— We have now to consider the subject suggested by the principal case, *Roberts v. Smith*; to wit, the nature of the duty which a man owes in the care of his premises, machinery, &c., towards his servants. *Roberts v. Smith* shows that the master does owe a duty to refrain from negligence towards his servants; but it has sometimes been supposed that this duty, whatever it is, is of a limited nature, peculiar to this relation, and less extensive than that which men owe to others who come by invitation upon their premises for purposes of business.

It has sometimes been supposed that duties towards servants, in respect of the condition of premises and machinery, exist, if at all, by contract. See *Albro v. Jaquith*, 4 Gray, 99; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; and see the declaration in *Riley v. Baxendale*, 3 Hurl. & N. 446. Indeed, the declaration in the principal case, *Roberts v. Smith*, alleged, when strictly considered, a contractual duty; but the duty was throughout treated as one raised by the law, and not by the act of the parties. But the duty to protect the servant (within its limitations) is not contractual, as was observed by Martin, B., in *Riley v. Baxendale*, *supra*. The duty to refrain from negligence towards a servant is, as will presently appear, the same that arises towards third persons. Suppose the master to have made a contract in writing to lodge and board the servant

and pay him certain wages, could it be supposed for a moment that the only duty which he owed his servant was to perform the requirements of that contract? Surely his negligence towards the safety of his servant could not be barred (on the doctrine which excludes parol evidence to vary a contract) by the existence of the contract, though in fact and in law that expresses all the duty which the master *contracted* to undertake. And, if it should be said that it is one of the implied terms of such a contract that the master should take proper precautions for the safety of his servants, the answer is that, if new terms are to be inserted into the agreement, *every* duty which the master owes might be treated as contractual, since it might be equally well assumed that the parties had them in view in entering into the relation of master and servant. And thus the servant might sue his master in contract for an assault and battery.

Returning now to the points suggested in the preceding paragraph, it is proper to examine the *dictum* of Willes, J., in *Indermaur v. Dames* as to the non-liability of a master for injuries sustained by his servant by reason of defects in the condition of the master's premises. The doctrine is founded upon the *dicta* of Lord Abinger in the well-known case of *Priestley v. Fowler*, 3 Mees. & W. 1; and it has been advanced in other cases. *Potts v. Plunkett*, 9 Irish C. L. 290; *Mellors v. Shaw*, 1 Best. & S. 437; *Southcote v. Stanley*, 1 Hurl. & M. 247; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572.

This doctrine is opposed by Mr. Green upon grounds which seem conclusive of its unsoundness. With the permission of that gentleman we reproduce the substance of his views, which

may be found at length in the 8th ed. of *Story on Agency*, § 453 *d*, note.

All that *Priestley v. Fowler* decides, Mr. Green observes, is that a master is not liable for damage suffered by a servant in the course of his employment when there has been no fault on the part of the master; which is clear enough. And all the cases which are supposed to have adopted the broader view of the *dicta* of Lord Abinger are cases in which the servant was injured directly or indirectly by the fault of the master. "And the cases warrant the conclusion that wherever negligence or a greater fault is imputable to the master, there he is liable to the servant.

1. But for damage caused by the ordinary risks of the employment, the master is not liable. Here there is no principle of law applicable to the relation of master and servant. In such case no fault is imputable to the master. These are the risks to which every one, master and servant alike, is at all times exposed throughout his life; personal prudence is the uncertain but only guard which any one has against them. The reason usually given for the non-liability of the master for these risks is that the hazard of the employment is compensated by the rate of wages. . . . But, however this may be, the rule needs no special reasons for its support, because it is but an application of the general principle that where there is no fault there is no liability. 2. Where the personal negligence of the master has directly caused the injury, there also the master's liability to the servant is the same as it would be to one not a servant. *Roberts v. Smith*, 2 Hurl. & M. 218; *Ashworth v. Stahwix*, 3 El. & E. 701; *Mellors v. Shaw*, 1 Best & S. 437; *Paulmeiser v. Erie R. Co.*, 34 N. J. 151; *Adesco Oil Co. v. Gilson*, 68

Penn. St. 146. 3. It is the duty of all who occupy real property to which others have the right to resort upon business with the occupier to take care that those so resorting there are not exposed to hidden dangers. Such persons have a right to expect that the occupier will use reasonable care to guard them from dangers of the existence of which he is or ought to be aware, and of the existence of which they are ignorant, provided he has no good reason to presume that they have equal knowledge upon the subject with himself. . . . The same duty which is imposed upon an occupier of real estate towards those resorting there upon lawful business is also imposed upon one who, in the way of business, intrusts his machinery, tools, and implements, or his personal property of any kind, to others to be used, towards those thus using them. Story on Bailm. §§ 275, 390, 391 *a*; *Blakemore v. Bristol, &c. Ry. Co.*, 8 El. & B. 1035, 1051; *McCarthy v. Young*, 6 Hurl. & M. 329; *Redfield on Carriers*, § 513, note; *Sawyer v. Rutland & B. R. Co.*, 27 Vt. 377; *Smith v. New York & H. Ry. Co.*, 19 N. Y. 127; *Caswell v. Worth*, 5 El. & B. 849. Notwithstanding the *dictum* of Willes, J., in *Indermaur v. Dames*, concerning the 'authorities, . . . respecting servants and others who consent to incur a risk being inapplicable' to that case, it is submitted that such authorities are precisely in point, and that the decided cases fully bear out the assertion that the position of the master toward his servant in respect to his real estate, his machinery, or his tools, is precisely the same as his position in those respects to all other persons with whom he has business relations touching their use. In other words, upon this point also there is no peculiar law applicable to the relation of master and servant. Cases may be unlike in some of their circumstances, but the rule of law applicable to them may be the same. A servant may be as well acquainted as, or better acquainted than, his master, with the danger of premises or the defects of machinery. If he is, he cannot recover. But the same is true of any other person having business with the master. The presumption of knowledge on the part of the servant, the presumption of ignorance on the part of others, are presumptions of fact, and not of law. There is no principle of law better established or more constantly reiterated than that it is the master's duty to take all reasonable precautions for the safety of his servant, and that when he knows, or should know, that his premises, his machinery, or his implements are unsafe, and when the servant is ignorant of the fact, the master having no sufficient cause to presume his knowledge, if damage from such cause happen to the servant, the master is liable. *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748; *Williams v. Clouch*, 3 Hurl. & N. 258; *Mellors v. Shaw*, 1 Best & S. 437; *Ashworth v. Stanwix*, 30 L. J. Q. B. 183; *Roberts v. Smith*, 2 Hurl. & M. 213; *Skipp v. Eastern Counties Ry. Co.*, 9 Ex. 223; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Bartonshill Coal Co. v. McGuire*, *ib.* 300; *Holmes v. Clarke*, 6 Hurl. & M. 369; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 586; *O'Byrne v. Barne*, 16 Ct. Sess. Cas. (2d series) 1025; *Grizzle v. Frost*, 3 Fost. & F. 622; *Ogden v. Rummens*, *ib.* 751; *Snow v. Housatonic R. Co.*, 8 Allen. 441; [*Walsh v. Peet Valve Co.*, 110 Mass. 23; *Watling v. Oastler*, Law R. 6 Ex. 73.] It is submitted that no case upon

the subject can be found which, apart from the *dicta* it may contain, is not an authority for the position that the duty which the master owes to the servant is precisely that which he owes to every other person with whom he has business relations."

In *Watling v. Oastler*, *supra*, it was held unnecessary for the servant to allege his ignorance of the defect in the machinery.

Servants injured from Negligence of Fellow-servants. — But while the master is liable for his own negligence to a servant who is injured thereby, it is well settled, in accordance with the doctrine of the principal case, *Farwell v. Boston & W. R. Corp.*, that he is not liable to a servant for injury caused by the negligence of a fellow-servant, provided he is himself free from the imputation of negligence in connection with the injury. *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, *ib.* 300; *Hutchinson v. Newcastle, &c. Ry. Co.*, 5 Ex. 343; *Morgan v. Vale of Neath Ry. Co.*, Law R. 1 Q. B. 149; *Gilman v. Eastern Ry. Co.*, 10 Allen, 233; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Beaulieu v. Portland*, 48 Maine, 291; *Weger v. Penn. R. Co.*, 55 Penn. St. 460; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Harper v. Indianapolis &c. R. Co.*, 47 Mo. 567; *LeClair v. St. Paul & P. R. Co.*, 20 Minn. 90. See *Chicago R. Co. v. Ward*, 61 Ill. 130.

But the master is guilty of negligence, and is therefore liable for the negligence of the servant, if he has employed him knowing that he is an unfit person for the business to which he has been assigned, or if the servant has been retained after notice of his unfitness. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Harper v. Indianapolis, &c. R. Co.*,

47 Mo. 567; *Chapman v. Erie R. Co.*, 55 N. Y. 529; *Lawler v. Androsc. R. Co.*, 62 Maine, 463. As to what is evidence of knowledge, see *Davis v. Detroit & M. R. Co.*, *supra*; *Toledo &c. R. Co. v. Conray*, 61 Ill. 162. So, too, if the employer is at fault in employing defective machinery. *LeClair v. St. Paul & P. R. Co.*, 20 Minn. 9. See also *Salters v. Delaware & H. Canal Co.*, 5 N. Y. Supreme, 559; *Lawler v. Androsc. R. Co.*, 62 Maine, 463.

So, if the injury be caused by one who is not a fellow-servant within the rule, the master may be liable. *Ford v. Fitchburg R. Co.*, 110 Mass. 240. And this, too, though there may be no evidence that the master knew, or had reason to suspect, any incompetence in the party by whom the injury was caused. *Ib.*

In the above case an engineer on a locomotive was injured by an explosion of the engine, which was out of repair. It was the duty of the agents of the corporation to provide the machinery for running the trains; and, in reply to the objection that these agents were fellow-servants, the court said: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents does not relieve the corporation

from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule, relied on, to be regarded as fellow-servants of those who are engaged in operating it. *They are charged with the master's duty to his servant.* They are employed in distinct and independent departments of service; and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may."

So it is held in Ohio that, if a subordinate servant be injured by the negligence of his superior, the master is liable. *Pittsburgh, &c., R. Co. v. Devinney*, 17 Ohio St. 197, 210. But see *Feltham v. England*, Law R. 2 Q. B. 33; *Lawler v. And. R. Co.*, 62 Maine, 463, and cases cited.

"The rule," says Mr. Green, "now apparently established in England and generally, perhaps, in this country is, that the term fellow-servant includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411; *Wilson v. Merry*, Law R. 1 H. L. Scotch, 326; *Columbus & I. R. Co. v. Arnold*, 31 Ind. 174; *Warner v. Erie*

Ry. Co., 39 N. Y. 470; *Hard v. Vermont & C. R. Co.*, 32 Vt. 480; *Beaulieu v. Portland Co.*, 48 Maine, 291; *Wiggett v. Fox*, 11 Ex. 832; *Searle v. Lindsey*, 11 Conn. B. N. S. 429; *Morgan v. Vale of Neath R. Co.*, Law R. 1 Q. B. 149; *Weger v. Penn. R. Co.*, 55 Penn. St. 460; *Harper v. Indianapolis, &c. R. Co.*, 47 Mo. 567." Story, Agency, § 453 *e*, note, 8th ed. See also *Svenson v. Atlantic Steamship Co.*, 57 N. Y. 108; *Michael v. Stanton*, 5 N. Y. Sup. 634; *Lawler v. Androsc. R. Co.*, 62 Maine, 463; *Gallagher v. Piper*, 33 Law J. C. P. 335; *Feltham v. England*, Law R. 2 Q. B. 33; *Howells v. Landore Steel Co.*, Law R. 10 Q. B. 62; *Smith v. Steele*, *ib.* 125; *Chicago v. Dermody*, 61 Ill. 431; *Louisville R. Co. v. Cavens*, 9 Bush, 559.

The rule which excludes the liability of the master for an injury by a fellow-servant's negligence does not prevent a recovery by the injured servant for consequential damages sustained by him by reason of an injury to his wife from such negligence. *Gannon v. Housatonic R. Co.*, 112 Mass. 234.

In *Albro v. Jaquith*, 4 Gray, 99, it was held that one fellow-servant was not liable to another for damage caused by his negligence in the course of the common employment. See *Southcote v. Stanley*, 1 Hurl. & N. 247. But see the criticism on this doctrine in the above cited note from Story on Agency; and see *Dicey, Parties*, 465, note; *Shearman & Redf., Negligence*, § 112.

SUTTON v. THE TOWN OF WAUWATOSA.

(29 Wis. 21. Supreme Court, Wisconsin, June Term, 1871.)

Contributory Negligence. Violation of Sunday Law by Plaintiff. The fact that plaintiff, at the time he suffered injuries to his person or property from the negligence of defendant, was doing some unlawful act, will not prevent a recovery, unless the act was of such a character as would naturally tend to produce the injury.

Thus, the fact that plaintiff was driving his cattle to market on Sunday, in violation of the statute, when they were injured by the breaking down of a defective bridge which the defendant town was bound to maintain, would not prevent a recovery upon due proof of defendant's negligence in constructing and maintaining such bridge.

The question whether plaintiff was guilty of contributory negligence, in driving so large a number of cattle as he did upon the bridge at one time, should be left to the jury, unless the evidence is decisive, not only as to the number of cattle so driven upon the bridge, but also as to the weight which bridges or highways like the one in question should be constructed to sustain.

A plaintiff should not be nonsuited unless it appears that the evidence in his behalf, upon the most favorable construction that the jury would be at liberty to give it, would not warrant a verdict for him.

APPEAL from County Court for Milwaukee County. Action against a town to recover damages for injuries to plaintiff's cattle, caused by the breaking down of a defective bridge which they were crossing.

The plaintiff started from Columbus on a Friday morning with a drove of about fifty cattle, intending to take them to Milwaukee, and sell them. Stopping at Hartland over Saturday night, he resumed his journey on Sunday morning, and at about four o'clock, P. M., reached a public bridge of about seventy-two feet span, over the Menomonee River, in the town of Wauwatosa. The cattle were driven upon the bridge; and, when the greater part of them were near the middle of the span, the stringers broke, some twelve feet from the abutments at each end, and precipitated the structure, with the cattle upon it, into the river, causing the death of some, severely injuring others, and rendering the remainder, for a time, unsalable.

The complaint alleges, that the injury was caused by the dangerous, unsafe, and rotten condition of the bridge, and the neglect of the defendant to keep it in proper repair.

The answer denies the negligence charged to the defendant

and alleges that the cattle were driven upon the bridge in so careless and negligent a manner as to cause it to break, and also that they were so driven upon the bridge on Sunday.

After hearing the evidence on the part of the plaintiff, the court granted a nonsuit, on the ground that the plaintiff, being in the act of violating the statute prohibiting the doing of secular business on Sunday, when the injury occurred, could not recover therefor. The plaintiff appealed.

Jenkins and *Elliott*, for appellant. *C. K. Martin* and *Palmer, Hooker* and *Pitkin*, for respondent.

DIXON, C. J. It is very clear that the plaintiff, in driving his cattle along the road and over the bridge, to a market, on Sunday, was at the time of the accident in the act of violating the provisions of the statute of this State, which prohibits, under a penalty not exceeding two dollars for each offence, the doing of any manner of labor, business, or work on that day, except only works of necessity or charity. R. S. c. 183, § 5. It was upon this ground the nonsuit was directed by the court below; and the point thus presented, that the unlawful act of the plaintiff was negligence, or a fault on his part contributing to the injury, and which will preclude a recovery against the town, is not a new one; nor is the law, as the court below held it to be, without some adjudications directly in its favor, and those by a judicial tribunal as eminent and much respected for its learning and ability as any in this country. *Bosworth v. Swansey*, 10 Met. 363; *Jones v. Andover*, 10 Allen, 18. A similar if not the very same principle has been maintained in other decisions of the same tribunal. *Gregg v. Wyman*, 4 Cush. 322; *May v. Foster*, 1 Allen, 408. But in others still, as we shall hereafter have occasion to observe, the same learned court has, as it appears to us, held to a different and contradictory rule in a class of cases which it would seem ought obviously to be governed by the same principle. The two first above cases were in all material respects like the present, and it was held there could be no recovery against the towns. In the first, the opinion, delivered by Chief Justice Shaw, and which is very short, commences with a statement of the propositions, repeatedly decided by that court, "that to maintain the action it must appear that the accident was occasioned exclusively by the defect of the highway; to establish which, it must appear that the plaintiff himself is free from all

just imputation of negligence or fault." The authorities to this proposition are cited, and the statute against the pursuit of secular business and travel on the Lord's day then referred to; and the opinion proceeds: "The act of the plaintiff, therefore, in doing which the accident occurred, was plainly unlawful, unless he could bring himself within the excepted cases; and this would be a species of fault on his part, which would bring him within the principle of the cases cited. It would show that his own unlawful act concurred in causing the damage complained of." This is all of the opinion touching the point under consideration.

In the next case there was a little, and but a little, more effort at reasoning upon the point. The illustrations on page 20, of negligence in a railway company in omitting to ring the bell of the engine, or to sound the whistle at the crossing of a highway, and of the traveller on the wrong side of the road with his vehicle at the time of the collision, and the language of the court alluding to such "conduct of the party as contributing to the accident or injury which forms the groundwork of the action," very clearly indicates the true ground upon which the doctrine of contributory negligence, or want of due care in the plaintiff, rests; but it is not shown how or why the mere violation of a statute by the plaintiff constitutes such ground. Upon this point the court only say: "It is true that no (direct unlawful act of omission or commission by the plaintiff,) done at the moment when the accident occurred, and tending immediately to produce it, is offered to be shown in evidence. But it is also true that, if the plaintiff had not been engaged in the doing of an unlawful act, the accident would not have happened, and the negligence of the defendants in omitting to keep the road in proper repair would not have contributed to produce an injury to the plaintiff. It is the disregard of the requirements of the statute by the plaintiff, which constitutes the fault or want of due care, which is fatal to the action." It would seem from this language that the violation of the statute by the plaintiff is regarded only as a species of (remote) negligence, or want of proper care on his part, contributing to the injury.

The two other cases above cited were actions of tort by the owners, to recover damages from the bailees for injuries to personal property loaned and used on Sunday,—horses loaned

and immoderately driven on that day. They were decided against the plaintiffs, and chiefly on the ground of the unlawfulness of the act of loaning or letting on Sunday of the horses, to be driven on that day in violation of the statute, which the plaintiffs themselves were obliged to show, and the doctrine of *par delictum* was applied. It was in substance held in each case that the plaintiff, by the first wrong committed by him, had placed himself *in pari delicto* with the defendant, with respect to the subsequent and distinct wrong committed by the latter; and the actions were dismissed upon the principle that the law will not permit a party to prove his own illegal acts in order to establish his case.

In direct opposition to the above decisions are the numerous cases decided by the courts of other States, and the courts of Great Britain, which have been so diligently collected and ably and forcibly presented in the brief of the learned counsel for the present plaintiff. Of the cases thus cited, with some others, we make particular note of the following: *Woodman v. Hubbard*, 5 Foster, 67; *Mohney v. Cook*, 26 Penn. 342; *Norris v. Litchfield*, 35 N. H. 271; *Corey v. Bath*, ib. 530; *Merritt v. Earle*, 29 N. Y. 115; *Bigelow v. Reed*, 51 Maine, 325; *Hamilton v. Goding*, 55 ib. 428; *Baker v. The City of Portland*, 58 ib. 199; *Kerwhacker v. Railway Co.*, 3 Ohio St. 172; *Phila., &c. Railway Co. v. Phila., &c. Tow-boat Co.*, 23 How. (U. S.) 209; *Bird v. Holbrook*, 4 Bing. 628; *Barnes v. Ward*, 9 M., G. & S. 420.

It seems quite unnecessary, if indeed it were possible, to add any thing to the force or conclusiveness of the reasons assigned in some of these cases in support of the views taken and decisions made by the courts. The cases may be summed up, and the result stated generally to be the affirmance of two very just and plain principles of law as applicable to civil actions of this nature; namely, first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with or leading to or causing or producing the wrongful act complained of; and, secondly, that the fault, want of due care, or negligence on the part of the plaintiff, which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. Under the oper-

ation of the first principle, the defendant cannot exonerate himself or claim immunity from the consequences of his own tortious act, voluntarily or negligently done to the injury of the plaintiff, on the ground that the plaintiff has been guilty of some other and independent wrong or violation of law. Wrongs or offences cannot be set off against each other in this way. "But we should work a confusion of relations, and lend a very doubtful assistance to morality," say the court in *Mohney v. Cook*, "if we should allow one offender against the law to the injury of another to set off against the plaintiff that he too is a public offender." Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the State, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this; and it seems contrary to the dictates of both that such a defence should be allowed to prevail. It would extend the maxim, *ex turpe causa non oritur actio*, beyond the scope of its legitimate application, and violate the maxim equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong, and to visit unmerited and over rigorous punishment upon the plaintiff, constitute the sole motive for such defence on the part of the person making it. In the cases of the horses let to be driven on Sunday, so far as the owners were obliged to resort to an action on the contract which was executory and illegal, of course there could be no recovery; but to an action of tort, founded not on the contract, but on the tort or wrong subsequently committed by the defendant, the illegality of the contract furnished no defence, as is clearly demonstrated in *Woodman v. Hubbard*, and the cases there cited. The decisions under the provision of the constitution of this State abolishing imprisonment for debt arising out of or founded on a contract, express or implied, and some others in this court, strongly illustrate the same distinction. *In re Mowry*, 12 Wis. 52, 56, 57; *Cotton v. Sharpstein*, 14 Wis. 229, 230; *Schennert v. Koehler*, 23 Wis. 523, 527.

And as to the other principle that the act or conduct of the plaintiff, which can be imputed to him as a fault, want of due care,

or negligence on his part contributing to the injury, must have some connection with the injury as cause to effect, this also seems almost too clear to require thought or elaboration. To make good the defence on this ground, it must appear that a relation existed between the act or violation of law on the part of the plaintiff and the injury or accident of which he complained; and that relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another. It must have been some act, omission, or fault naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances. It is obvious that a violation of the Sunday law is not of itself an act, omission, or fault of this kind, with reference to a defect in the highway or in a bridge over which a traveller may be passing, unlawfully though it may be. The fact that the traveller may be violating this law of the State has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day; and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned. In this respect it would be wholly immaterial also that the traveller was within the exceptions of the statute, and travelling on an errand of necessity or charity, and so was lawfully upon the highway.

The mere matter of time when an injury like this takes place is not in general an element which does or can enter at all into the consideration of the cause of it. Time and place are circumstances necessary in order that any event may happen or transpire; but they are not ordinarily, if they ever are, circumstances of cause in transactions of this nature. There may be concurrence or connection of time and place between two or three or more events, and yet one event not have the remotest influence in causing or producing either of the others. A traveller on the highway, contrary to the provisions of the statute, yet peaceably and quietly pursuing his course, might be assaulted and robbed by a highwayman. It would be difficult in such case to perceive how the high-

wayman could connect the unlawful act of the traveller with his assault and robbery so as to justify or excuse them, or how it could be said that the former had any natural or legitimate tendency to cause or produce the latter. It is true, it might be said if the traveller had not been present at that particular time or place, he would not have been assaulted and robbed, but that too might be said of any other assault or robbery committed upon him ; for if his presence at one time and place be a fault or wrong on his part, contributing to the assault and robbery in the nature of cause to effect, it must be equally so at every other time and place, and so always a defence in the mouth of a highwayman. Every highwayman must have his opportunity by the passing of some traveller ; and so some one must pass over a rotten and unsafe bridge or defective highway before any accident or injury can happen from that cause. Connection, therefore, merely in point of time, between the unlawful act or fault of the plaintiff and the wrong or omission of the defendant, the same being in other respects disconnected, and independent acts or events, does not suffice to establish contributory negligence or to defeat the plaintiff's action on that ground. As observed in *Mohney v. Cook*, such connection, if looked upon as in any sense a cause, whether sacred and mysterious or otherwise, clearly falls under the rule *causa proxima non remota spectatur*.

"The cause of an event," says Appleton, C. J., in *Moulton v. Sanford*, 51 Maine, 184, "is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily that condition is usually termed the cause, whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event." In the present case the weight of the same cattle, upon the same bridge, either the day before or the day after the event complained of, when the plaintiff would have been guilty of no violation of law in driving them, would most unquestionably have produced the same injurious result. And if, on that day even, the driving had been a work of necessity or charity, as if the city of Milwaukee had been in great part destroyed by fire, as Chicago recently was, and great numbers of her inhabitants in a condition of helplessness and starvation, and the plaintiff hurrying up his drove of beef cattle for their relief, no one doubts the same acci-

dent would then have happened, and the same injuries have ensued. The law of gravitation would not then have been suspended, nor would the rotten and defective stringers have refused to give way under the superincumbent weight, precisely as they did do on the present occasion. There are many other violations of law which the traveller or other person passing along the highway may, at the time he receives an injury from a defect in it, be in the act of committing, and which are quite as closely connected with the injury, or the cause of it, as is the violation of which complaint is made against the present plaintiff. He may be engaged in cruelly beating or torturing his horse, or ox, or other animal ; he may be in the pursuit of game, with intent to kill or destroy it, at a season of the year when this is prohibited ; he may be exposing game for sale, or have it in his possession, when these are unlawful ; he may be in the act of committing an assault or resisting an officer ; he may be fraudulently passing a toll-gate, without paying his toll ; and he may be unlawfully setting or using a net or seine, for the purpose of catching fish, in an inland lake or stream. All of these are acts prohibited by the same chapter or statute in which we find the prohibition from work and labor on Sunday, and some of them under the same, but most under a greater penalty than is prescribed for that offence, thus showing the character or degree of culpability which was variously attached to them in the opinion of the legislature. And there are many other minor offences, *mala prohibita* merely, created by statute, which might be in like manner committed. There are in Massachusetts, and doubtless in many of the States, statutes against blasphemy and profane cursing and swearing, the prevention of which seems to be equally if not more an object of solicitude and care on the part of the legislature than the prevention of labor, travel, or other secular pursuits on Sunday, because more severely punished. It has not yet transpired, we believe, even in Massachusetts, that the action of any person to recover damages for an injury sustained by reason of defects in a highway has been peremptorily dismissed because he was engaged at the time in profane cursing or swearing, or because he was in a state of voluntary intoxication, likewise prohibited under penalty by statute.

It is obvious that the breaking down of a bridge from the rottenness of the timbers, or their inability to sustain the weight of the person or of his horses and carriage, could not be effected by

either of these circumstances; and yet, on the principle of the decisions above referred to in that State, it is not easy to see why the action must not be dismissed. On principle there could be no discrimination between the cases, and it could make no difference in what the unlawful act of the plaintiff consisted at the time of receiving the injury. We must reject the doctrine of those cases entirely, and adopt that of the other cases cited, and which is well expressed by the Supreme Court of Maine, in *Baker v. Portland*, 59 Maine, 199, 204, as follows: "The defendant's counsel contends that the simple fact that the plaintiff is in the act of violating the law at the time of the injury is a bar to the right of recovery. Undoubtedly there are many cases where the contemporaneous violation of the law by the plaintiff is so connected with his claim for damages as to preclude his recovery; but to lay down such a rule as the counsel claims, and disregard the distinction in the ruling of which he complains, would be productive oftentimes of palpable injustice. The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half the road, or that he was travelling on runners without bells, in contravention of the statute, or that he was smoking a cigar in the street, in violation of municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travellers, if the commission of the plaintiff's offence did not in any degree contribute to produce the injury of which he complains."

Strong analogy is afforded, and much weight and force of reason bearing upon this question are found, in some of the cases which have arisen upon life policies, and as to the meaning and effect to be given to the condition usually contained in them, exempting the company from liability in case the assured "shall die in the known violation of any law," &c., and it has been held that the violation must be such as is calculated to endanger life, by leading to acts of violence against, or to the bodily or personal injury or exposure of, the assured, and so to operate in producing his death in the connection of cause to effect. See opinions in *Bradley v. Mutual Benefit Life Ins. Co.*, 44 N. Y.

In the case of *Clemens v. Clemens*, recently decided by this court, it became necessary to consider the same question, though

under different circumstances, as to what violation of law on the part of the plaintiff would bar his action in a court of justice, and leave him remediless in the hands of an over-reaching and dishonest antagonist; and the views there expressed are not without their relevancy and adaptation to the question as here presented. In that case, this court adopted the rule of law as settled in Massachusetts, favoring the remedy of the plaintiff, against the opposite rule sustained by the adjudications in some of the other States; and consistency of decision seems now clearly to require that our action should be reserved with respect to the rule established by the cases here referred to. The inconsistency upon general principle between these decisions of the same learned court and those there relied upon and adopted, will, we think, be readily perceived and conceded when carefully examined and considered in connection with each other.

The other question presented on the motion for a nonsuit, and which the court below did not decide, but which has been argued here, is one of more doubt and difficulty to our minds. It is whether the plaintiff was guilty of contributory negligence in permitting so many cattle to go upon the bridge at one time. To sustain the nonsuit on this ground, it is necessary for us to look at the facts in the most favorable light possible for the plaintiff, in which the jury would have been at liberty to find them, and then to say that there was no evidence which would have justified a verdict in his favor, or such a clear and decided preponderance of evidence against him as would have required the court to set aside a verdict finding to the contrary. This court is not sufficiently familiar with the modes of constructing and using bridges upon country highways, the degree of strength required to render them ordinarily and reasonably safe and passable, the weight which they are expected or required to sustain, the care necessary in passing over them, and especially with herds of cattle or other animals, to say, with confidence in the correctness of its own judgment, upon the evidence before it, that the plaintiff was guilty of such negligence. The evidence given throws little or no light upon these points, necessary to the formation of a correct judgment; and they are matters upon the evidence, when in, more properly to be considered by the jury, unless the evidence should be such, within the rule above stated, as to make it the duty of the court to withdraw them from the consideration of

the jury, and itself to determine the legal rights of the parties upon the truth of the facts thus assumed to be indisputably shown.

By the court. *Judgment reversed, and a venire de novo awarded.*

Ground of Doctrine of Contributory Negligence. — Speaking in general terms, it is a defence to an action in tort that the negligence of the plaintiff contributed to produce the injury. And the reason of this, as has already been intimated (*ante*, p. 609), is to be explained upon the legal principles of causation. *There is nothing peculiar in the doctrine of contributory negligence.* The law makes men liable in tort for those wrongs alone which they have caused, either personally or by another under their power or authority. If the defendant (or his agent or servant) have not caused the damage, he is not liable; and it is part of the plaintiff's case to prove that the defendant caused the harm of which the complaint is made. Now, if there intervened between the wrongful act or omission of the defendant and the injury sustained by the plaintiff a legal fault of the latter which contributed to produce this injury, it follows that the misfortune might not have happened but for that fault; and hence the plaintiff cannot prove that the defendant caused the harm, and cannot recover.

In some cases the evidence may be such that the plaintiff cannot recover even when the defendant's fault was an adequate cause to produce the injury without the plaintiff's negligence, as in cases of collision and the like where the fault on each side is contemporaneous. See *Murphy v. Deane*, 101 Mass. 455; *infra*, p. 724, where the point is more fully considered. But in no case can

the plaintiff recover where the evidence falls short of showing that the defendant's act or omission caused, or was adequate to cause, the injury. (As to the contributory acts of strangers, see *ante*, pp. 608 *et seq.*)

On the other hand, conditions must not be confounded with causes. Even as to violations of law of which the plaintiff may be guilty at the time of receiving the injury, it must, according to reason as well as authority, be considered whether the conduct of the plaintiff had a natural tendency, such as exists between cause and effect, to throw him into the danger which the defendant left exposed. If it had not, it did not in any proper sense contribute to the injury. It is not enough that the plaintiff was violating the rights of the public, as in Sabbath-breaking or gambling; the law has a punishment of its own for that, which cannot be made use of by a citizen for his own purposes. It is only where the plaintiff's violation of duty consists in setting in motion the wrongful act of the defendant, or in infringing upon the defendant's rights in direct connection with the injury, that the plaintiff's act can be regarded as an intervening cause.

The above are the doctrines of the principal case, *Sutton v. Wauwatosa*; and that case indicates the settled current, or at least the strong tendency, of the late cases. Even in Massachusetts, where there has been a contrary set of authorities in cases under the Sunday laws (see *supra*, p. 712), the

court have to some extent receded from their former position. Thus, in *Hall v. Corcoran*, 107 Mass. 251, the case of *Gregg v. Wyman*, 4 Cush. 322, in which the defendant escaped liability for killing the plaintiff's horse, on the ground that it had been let to him on Sunday, was distinctly overruled.

So, too, it has been decided that one who is walking on the highway on Sunday, simply for exercise and "to take the air," may recover against a town for negligence whereby the plaintiff sustains injury; though the Sunday law imposes a fine upon persons travelling on that day, except in cases of necessity or charity. *Hamilton v. Boston*, 14 Allen, 475. But the court held, in a learned opinion, that the plaintiff was not travelling, within the meaning of the statute; and *Bosworth v. Swansey*, 10 Met. 363, and *Jones v. Andover*, 10 Allen, 18, were cited as law.

So, also, it has been held by the same court that one who had been illegally travelling on the Lord's day, and stopped at a hotel, leaving a buffalo robe in charge of the landlord's servant, could recover for its loss during the night. *Cox v. Cook*, 14 Allen, 165.

However, the doctrine of *Bosworth v. Swansey* was upheld and applied in *Stanton v. Middlesex R. Co.*, 14 Allen, 485, and during the present year in *Connolly v. Boston*, 117 Mass. 64. See also *Maynard v. Boston & Maine R. Co.*, 115 Mass. 458, where also the illegal act was not, properly speaking, contributory; *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *McDonnell v. Pittsfield, &c. R. Corp.*, 115 Mass. 564.

Since most of the above cases it has been held that the question whether the plaintiff, under the Sunday law,

was travelling from necessity or charity is for the jury. And it was decided that the fact that the exercises of a spiritualist camp-meeting included a show to which an admittance fee of twenty-five cents was charged, and that some of the speakers declared that they would throw away the Bible in their search for truth, were not conclusive that the plaintiff, who had gone on Sunday to attend the meeting, had done so unlawfully. *Feital v. Middlesex R. Co.*, 109 Mass. 398. See, further, *Gorman v. Lowell*, 117 Mass. 65.

In *Murphy v. Deane*, 101 Mass. 455, it was conceded by the court that negligence on the part of the plaintiff would not preclude a recovery for the defendant's negligence unless it directly contributed to produce the injury. Now negligence is sometimes unlawful, equally with Sabbath-breaking, as in the case of careless driving, contrary to a town ordinance. If, then, the rule in *Murphy v. Deane* cover this case, and is to be adhered to, the other rule must in consistency give way. Suppose, again, the plaintiff were injured while cudgelling his horse (on his own premises), contrary to the statute, and while doing so should be injured by the defendant's negligence, when if he had been elsewhere he would not have been hurt; would the court hold that the illegality of the plaintiff's conduct *per se* precluded recovery?

Upon the principle above set forth, one who becomes paralyzed by fear through the misconduct of the defendant, and, while in such a state of mind and owing to it, rushes into danger and is hurt, is not guilty of contributory negligence. The defendant's unlawful act caused the fear, and what happened afterwards was but the natural sequence of effect following cause. And so we

find the cases. *Coulter v. American Exp. Co.*, 5 Lans. 67, s. c. 56 N. Y. 585; *Indianapolis, &c. R. Co. v. Carr*, 35 Ind. 510; *Illinois Central R. Co. v. Able*, 59 Ill. 181; *Frink v. Potter*, 17 Ill. 406; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa, 47; *Stokes v. Saltonstall*, 13 Peters, 181; *Buel v. New York Cent. R. Co.*, 31 N. Y. 314; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Johnson v. West Chester & P. R. Co.*, 70 Penn. St. 357; *Galena & C. R. Co. v. Yarwood*, 17 Ill. 509; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Sears v. Dennis*, 105 Mass. 310; *Babson v. Rockport*, 101 Mass. 93; *ante*, p. 609.

But whether the fright or confusion was caused by the defendant is a question for the jury, and perhaps, too, whether it was reasonable in the particular person. *Johnson v. West Chester & P. R. Co.*; *Galena & C. R. Co. v. Yarwood*, *supra*. And what would be reasonable in a child might not be in a man, and so of other cases. *Filer v. New York Cent. R. Co.*, 49 N. Y. 47. (As to questions for the jury, see *ante*, p. 589. And as to what constitutes negligence, consult the same note, where the rules are stated for the determination of questions of the existence of negligence, as a matter of law. As to the law concerning deaf and blind persons, see *Illinois Central R. Co. v. Buckner*, 28 Ill. 299; *Chicago & R. R. Co. v. McKean*, 40 Ill. 218; *Sleeper v. Sandown*, 52 N. H. 244. As to drunken persons, *Cassidy v. Stockbridge*, 21 Vt. 391; *Alger v. Lowell*, 3 Allen, 402; *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226; *Thorp v. Brookfield*, 36 Conn. 320; *Toledo, &c. R. Co. v. Riley*, 47 Ill. 514.)

There are some cases which apparently present exceptions to the principle of causation, even as above

explained. We refer to cases like *Bird v. Holbrook*, 4 Bing. 628, elsewhere noticed, in which it has been held that even a trespasser whose act has truly contributed to the injury of which he complains may sometimes recover damages. But these cases stand upon the ground that the defendant has been guilty of an enormous and inhuman act, beside which the slight trespass of the plaintiff is not worthy of consideration. The defendant has knowingly and intentionally caused the plaintiff to be maimed for venturing upon his premises on a very innocent errand. The defendant would have been no more guilty had he himself sprung the trap or engine upon the plaintiff's entry; and the trespass would be as properly the cause of the injury in this case as in the other. But, if the plaintiff had fallen into a well which had been carelessly left uncovered, the occupant of the premises would not have been liable. See *ante*, p. 697.

As to the proper mode of instructing the jury in cases of contributory negligence, the case of *Tuff v. Warman*, 5 Com. B. n. s. 573, has of late been generally followed. See *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; *New Jersey Express Co. v. Nichols*, 33 N. J. 435; *Scott v. Dublin & W. Ry. Co.*, 11 Irish C. L. 377; *London, B., &c., Ry. Co. v. Walton*, 14 Law T. n. s. 253. (As to the proper province of the court and jury, the rules of law are not different from those stated *ante*, p. 509. Several of the cases there cited were cases of contributory negligence.)

In the above case of *Tuff v. Warman*, the court laid down the following as the proper question for the jury: "Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether

the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened." "In the first case," say the court, "the plaintiff would be entitled to recover; in the latter, not, as but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." This, it was added, appeared to be the result deducible from the opinion of the judges in *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junction Ry. Co.*, 3 Mees. & W. 246; *Davies v. Mann*, 10 Mees. & W. 548; *Dowell v. General Steam Nav. Co.*, 5 El. & B. 206.

Well-founded doubts have been expressed of the correctness of such instructions as a universal formula. Under it a plaintiff might in some cases recover, contrary to all principle. "If it should appear," said Wells, J., of this case, in *Murphy v. Deane*, 101 Mass. 455, 464, "that the negligence of the defendant was an adequate cause to produce the result, the plaintiff must recover, even though he was himself equally, or even to a greater degree than the defendant, in fault. If the case can be supposed in which both parties were equally in fault, the fault of each being equally proximate, direct, and adequate to produce the result, so

that it might have occurred from the conduct of either without the fault of the other, there would then be a case of contributory negligence, for the consequences of which neither could recover from the other. But upon the statement quoted [*supra*] from *Taff v. Warman*, neither would be 'disentitled,' and therefore both could recover, if both suffered injury, each from the other. Every case in which the proof fails to show, or leaves it in doubt, which of two sufficient causes was the actual proximate cause of the injury, is practically such a case. It is manifest from this illustration that, as a definition of the limits of the right to recover in such cases, the proposition must be logically incorrect. Eliminating negatives from the first branch of the proposition, it is that a plaintiff may recover in such cases unless the misfortune could not have happened but for his own negligence. This, as we have seen, being stated affirmatively, is too broad and not correct, although its supplement or negative counterpart is correct as far as it extends; to wit, that he cannot recover if the misfortune could not have happened but for his own negligence."

The learned judge thought that the rule, as stated by Pollock, C. B., in *Greenland v. Chaplin*, 5 Ex. 248, was accurate, except that it omitted the consideration of the burden of proof (as to which see *infra*). The rule referred to was that, when the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action. See *Dowell v. General Steam Navigation Co.*, 5 El. & B. 195; *Bridge v. Grand Junction Ry. Co.*, 3 Mees. & W. 244; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Trow v.*

Vermont Cent. R. Co., 24 Vt. 487; *Beers v. Housatonic R. Co.*, 19 Conn. 566.

The last clause in the rule stated in *Tuff v. Warman* (that the plaintiff might recover if the defendant could have avoided the consequences of his negligence) is evidently applicable only to cases in which the plaintiff's negligence precedes the defendant's. "But where," says Wells, J., *ut supra*, "the negligent conduct of the two parties is contemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the rule of law is rather that the plaintiff cannot recover, if by due care on his part he might have avoided the consequences of the carelessness of the defendant. *Lucas v. New Bedford & T. R. Co.*, 6 Gray, 64; *Waite v. North-eastern Ry. Co.*, 9 El. & B. 719; *Robinson v. Cone*, 22 Vt. 213; [*Daniels v. Clegg*, 28 Mich. 32; *Walsh v. Miss. R. Co.*, 52 Mo. 434; *Newhouse v. Miller*, 35 Ind. 463]. Suppose the case of a collision upon a public highway; both parties careless and equally in fault, but either by the exercise of proper care on his part might have avoided the consequences of the carelessness of the other. By the proposition last quoted from *Tuff v. Warman*, each would be liable to the other, and each would be entitled to recover from the others for whatever injuries he might have received."

The true question for the jury in the opinion of the court (aside from the burden of proof) was whether there was negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arose; if there was, the plaintiff could not recover.

This, it will be observed, is, in effect,

only another way (and for an average jury, perhaps, a more suitable) of stating the rule above mentioned, to wit, that, if the plaintiff's conduct acted as an intervening cause between the act or omission of the defendant and the injury, the plaintiff cannot recover, since he cannot prove that the defendant's misconduct was the cause of the misfortune. The object of our examination has been to ascertain the ground of the doctrine of negligence, and to show that there is (or need be) nothing peculiar in it.

In Illinois and Georgia, however, the courts allow juries to apportion the negligence of the plaintiff and defendant, respectively, somewhat like the rule in cases of marine torts, and to allow the plaintiff to recover in case the defendant's negligence was greater than the plaintiff's, but denying the right of recovery where the negligence of the plaintiff was as great as, or greater than, that of the defendant. *Chicago, &c., R. Co. v. Van Patten*, 64 Ill. 510; *Chicago & North-western R. Co. v. Sweeney*, 52 Ill. 330; *Illinois Cent. R. Co. v. Baches*, 59 Ill. 379. See *O'Keefe v. Chicago, &c., R. Co.*, 32 Iowa, 467. But this doctrine (called the doctrine of comparative negligence) applies, probably, only in those cases where the plaintiff's negligence directly contributed, as an intervening cause, to the misfortune.

Burden of Proof. — Upon the question of the burden of proof in respect of contributory negligence, there is a diversity of authority. In New England, Illinois, and elsewhere, the rule is that the plaintiff must show, in the first instance, that, when the injury occurred, he was in the exercise of proper care, and that the misfortune was not caused by his own negligence.

Murphy v. Deane, *supra*; Trow v. Vermont Cent. R. Co., 24 Vt. 487; Birge v. Gardiner, 19 Conn. 507; Park v. O'Brien, 23 Conn. 339; Dickey v. Maine Tel. Co., 43 Maine, 492; Dyer v. Talcott, 16 Ill. 300; Galena & B. R. Co. v. Fay, *ib.* 558; Dressler v. Davis, 7 Wis. 527; Evansville & I. R. Co. v. Hiatt, 17 Ind. 102. And in the first case cited it is stated that the plaintiff does not sustain that burden if the proof leaves it in doubt whether or not the injury resulted, in whole or in part, from the fault of the plaintiff.

In the Supreme Court of the United States, in Pennsylvania, apparently in New York, and elsewhere, the contrary rule prevails; the plaintiff not being required to give evidence of his own care and prudence at the time of the accident. Railroad Co. v. Gladmon, 15 Wall. 401; Pennsylvania Land Co. v. Bentley, 66 Penn. St. 30; Cleveland R. Co. v. Rowan, *ib.* 393; Oldfield v. New York & H. R. Co., 3 E. D. Smith, 103; s. c. 14 N. Y. 310; Johnson v. Hudson River R. Co., 5 Duer, 21; s. c. 20 N. Y. 65; Button v. Hudson River R. Co., 18 N. Y. 248; Wilds v. Hudson River R. Co., 24 N. Y. 430; Smoot v. Wetumpka, 24 Ala. 112; Durant v. Palmer, 5 Dutch. 544; St. Anthony Falls Co. v. Eastman, 20 Minn. 277.

This seems to be the more correct doctrine. To hold the contrary is in effect to raise a presumption of law that the plaintiff himself caused the accident; and this is contrary to the analogies of the law. The presumption as to the defendant is that he was acting according to law; and it is difficult to see why (in the absence of statute) the same presumption should not be raised in favor of the plaintiff. All men are presumed to act lawfully until the contrary is shown.

Identification or Imputability. (a.) Passenger and Carrier. — We conclude this note on contributory negligence, and with it our chief labor on this book, with a consideration of what is sometimes called the doctrine of imputability. The rule prevails in England and in several of the States of this country that a passenger in a stage or railway coach becomes so far identified with the carrier, by the act of obtaining passage, that the negligence of the carrier is imputed to him, in the case of an action by the passenger against another through whose negligence an accident has occurred to the plaintiff's coach, resulting in injury to the plaintiff. That is, if the carrier was guilty of contributory negligence, the passenger cannot recover against the other. Thorogood v. Bryan, 8 Com. B. 115; Catlin v. Hills, *ib.* 123; Armstrong v. Lancashire Ry. Co., Law R. 10 Ex. 47; Cleveland, &c., R. Co. v. Terry, 8 Ohio St. 570; Puterbaugh v. Reasor, 9 Ohio St. 484; Smith v. Smith, 2 Pick. 621; Lockhardt v. Lichenthaler, 46 Penn. St. 151.

In Thorogood v. Bryan, *supra*, Coltman, J., said that the case raised distinctly the question whether a passenger in an omnibus was to be considered so far identified with the owner that negligence on the part of the owner or his servant was to be considered negligence of the passenger himself. "As I understand the law upon this subject," said he, "it is this: that a party who sustains an injury from the careless or negligent driving of another may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as an excuse is, not the personal negligence of the party injured, but the neg-

ligence of the driver of the omnibus in which he was a passenger. But it appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that, if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury." Mr. Justice Maule said: "On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. . . . If there is negligence on the part of those who have contracted to carry the passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say that, although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible to a passenger." The other judges concurred.

The above, it is believed, are the only grounds which have been taken in any of the cases for sustaining the rule. The doctrine has not been received without objection, even in England. "If," say the learned editors of *Smith's Leading Cases* (vol. i. p. 220, 4th Eng. ed.), "two drunken stage-coachmen were to drive their respective carriages against each other and injure the pas-

sengers, each would have to bear the injury to his carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachmen who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood v. Bryan*; but it may be questioned whether the reasoning of the court in that case is consistent with those of *Rigby v. Hewitt*, 5 Ex. 240, and *Greenland v. Chaplin*, ib. 243, or with the series of decisions from *Quarman v. Burnett*, 6 Mees. & W. 499, to *Reedie v. London & North-western Ry. Co.*, 4 Ex. 244. Why in this particular case both the wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood v. Bryan*." And this criticism is referred to as "damaging" by Williams, J., in the course of the argument of *Tuff v. Warman*, 2 Com. B. n. s. 740, 750.

So, too, Dr. Lushington, in the High Court of Admiralty, has declined to follow *Thorogood v. Bryan*. The *Milan*, 1 Lush. 388. This was a case of collision between two vessels, in mutual fault, in which the plaintiffs, owners of a cargo on one of the vessels, were held entitled to recover half the damages from the other vessel. As to *Thorogood v. Bryan* the learned judge observed: "I decline to be bound by it, because it is a single case; because I know upon inquiry that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly

against *Hay v. LeNeve*, 2 Shaw's Scotch Appeals, 395, and the ordinary practice of the Court of Admiralty; for if, by the practice of the Court of Admiralty, the owner of a delinquent ship, where both ships are to blame, may recover one-half of his loss, *a fortiori* the innocent owner of the cargo cannot be deprived of a like remedy."

But *Thorogood v. Bryan* has just been reaffirmed in England. *Armstrong v. Lancashire Ry. Co.*, Law R. 10 Ex. 47.

The law of Scotland is also opposed to *Thorogood v. Bryan*. *Brown v. McGregor*, Hay, 10. In this case the representatives of one Brown, a passenger riding upon the top of a coach, who was killed by the overturning of the coach in consequence of a collision with a post-chaise while both vehicles were driving at unusual speed, were allowed to recover against each of the proprietors of the carriages.

In this country the decisions are in conflict. In several of the States the doctrine of *Thorogood v. Bryan* prevails. See *supra*, p. 726. In others the contrary is held. *Chapman v. New York & N. H. R. Co.*, 19 N. Y. 341; *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Danville, &c., Turnpike Co. v. Stewart*, 2 Met. (Ky.) 119.

If any doubt was thrown upon the subject in New York by the *dicta* of *Brown v. New York Cent. R. Co.*, 32 N. Y. 597, the question was settled by *Webster v. Hudson River R. Co.*, *supra*.

The doctrine of the latter cases is, we apprehend, the correct one. It is difficult to understand how the plaintiff can become "identified" with the driver or carrier. He certainly does not become so physically; and the only other way he could lose his identity in another, so far as such an expression has

any intelligible meaning, is either by becoming the agent or servant of the other, or by making the other *his* agent or servant. The former would not be suggested; and the latter is quite as untenable. It needs no argument to show that the driver or carrier is not the passenger's servant. If he were, he could send him to another employment in the midst of the journey. Nor is he the passenger's agent. The situation is not materially different from that between a telegraph company and the sender of a telegram; and we have elsewhere endeavored to show that there is no agency in the legal sense in such a case. And for this we had some support from the authorities, which hold that the telegraph company are not agents of the sender of a despatch incorrectly transmitted, so as to bind him in contract to the receiver of the message. *Henkel v. Pape*, Law R. 6 Ex. 7; *Verdin v. Robertson*, 10 Ct. Sess. Cas. (3d series) 35. See *ante*, p. 624.

The driver or carrier is simply the vehicle through which the plaintiff accomplishes his purpose. The plaintiff has no control over him after starting. He cannot terminate his authority; he cannot compel him to stop by the way; he cannot instruct him what road to take, or how to drive, or how to pass a coach or an obstruction. But an agent is bound to obey the reasonable instructions of his principal.

In the case of *The Milan*, already cited, Dr. Lushington, speaking to the argument that a shipper who was not owner or part-owner was either principal or agent of the master of the vessel, said: "It is argued that he shall be so considered, and deprived of his remedy, because he himself, or his agent, selected the ship by which his goods were carried. But there is in my judg-

ment in the mere selection of the ship for the conveyance of his cargo none of the ingredients which constitute any kind of responsibility for a collision; for I cannot conceive a responsibility for an act done where the individual has not, either by himself or his agent, any power of interference or control."

Again, if the relation of principal and agent existed between the passenger and carrier, the principal should be liable for any negligence of the agent in the course of the agency. Suppose I engage the owner of a carriage to convey me to an adjoining place, and that on the way he negligently runs over a man (who was free from fault); am I liable?

The only case, we submit, where the so-called doctrine of identification or imputation can be applied is where the passenger actually participates in the carrier's fault, as by urging him on, or by plainly manifesting approval of his course, and thus encouraging him in it.

(b.) *Parent and Child.* The doctrine of imputability has appeared in another form also. It has been held in many cases that the negligence of the parent or guardian of a young child in allowing the child to fall into danger is imputable to the child, so as to make out a case of contributory negligence on the part of the child in an action by it for personal injury sustained by reason of the negligence of another. *Waite v. North-eastern Ry. Co.*, 111 Mass. 719; *Holly v. Boston Gas Co.*, 8 Gray, 123; *Callahan v. Bean*, 9 Allen, 401; *Wright v. Malden & M. R. Co.*, 4 Allen, 283; *Lynch v. Smith*, 104 Mass. 52; *Brown v. Eastern, &c., Ry. Co.*, 58 Maine, 384; *Hartfield v. Roper*, 21 Wend. 615; *Lehman v. Brooklyn*, 29 Barb. 234; *Mangam v. Brooklyn City R. Co.*, 36 Barb. 529; *Flynn v. Hatton*,

4 Daly, 552; *Chicago v. Starr*, 42 Ill. 174; *Pittsburgh, &c., R. Co. v. Vining*, 27 Ind. 513; *Lafayette, &c., R. Co. v. Huffman*, 28 Ind. 287; *Louisville Canal Co. v. Murphy*, 9 Bush, 522. See *Wharton, Negligence*, §§ 809-812.

But there are as many decisions to the contrary. *Robinson v. Cone*, 22 Vt. 213; *Norwich & W. R. Co. v. Daly*, 26 Conn. 591; *Birge v. Gardiner*, 19 Conn. 507; *Bronson v. Southbury*, 37 Conn. 199; *Smith v. O'Connor*, 48 Penn. St. 218; *Glassey v. Hestonville*, 57 Penn. 172; *North Penn. R. Co. v. Mahoney*, ib. 187; *Bellefontaine, &c., R. Co. v. Snyder*, 18 Ohio St. 399. See also *Pittsburgh Ry. Co. v. Caldwell*, 74 Penn. St. 421, where it was held that the negligence of a child's companion could not be imputed to the child; *Chicago, &c., R. Co. v. Gregory*, 58 Ill. 226; *Karr v. Parks*, 40 Cal. 188; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Whirley v. Whittemore*, 1 Head, 610.

It is clear, however, that the defendant cannot be liable without proof of negligence. *Singleton v. Eastern Counties R. Co.*, 7 Com. B. N. S. 287.

This, also, is clear, that if the child be itself guilty of contributory negligence, independently of negligence in its parent or guardian, there can be no recovery against the defendant. And whether the child was guilty of personal negligence depends upon its age and capacity to take proper care of itself. *Lynch v. Smith*, 104 Mass. 52; *Elkins v. Boston & A. R. Co.*, 115 Mass. 190; *Dowd v. Chicopee*, 116 Mass. 93; *Mulligan v. Curtis*, 100 Mass. 512; *Munn v. Reed*, 4 Allen, 431; *Lynch v. Nurdin*, 1 Q. B. 29; *Haycroft v. Lake Shore R. Co.*, 5 N. Y. Sup. 49; *Crissey v. Hestonville Ry. Co.*, 75 Penn. 88;

Phila. City Ry. Co. v. Hassard, ib. 367; Railroad Co. v. Gilman, 15 Wall. 401; Bronson v. Southbury, 37 Conn. 199; Schmidt v. Milwaukee, &c. R. Co., 23 Wis. 186. In some cases it has, however, been held that the same discretion is required of a child as of a man. Burke v. Brooklyn R. Co., 49 Barb. 529; Pittsburgh, &c. R. Co. v. Vining, 27 Ind. 513. See, also, Hughes v. Macfie, 2 Hurl. & C. 744; Lygo v. Newbold, 9 Ex. 302; Hoveysberger v. Second Av. R. Co., 2 Abb. App. Dec. 378; Brown v. European, &c. R. Co., 58 Maine, 384. And possibly this may sometimes be true provided the child is old enough to be capable of negligence. Whether the question of negligence be one of law or fact seems to depend upon the nature of the child's act or omission, as well as upon age and capacity. See the above cases; also Mulligan v. Curtis, 100 Mass. 512.

It should seem, too, upon principle, in the case of a child too young to be capable of negligence, that if the negligence of the parent or person in charge of it were in the proper sense contributory to the injury, — that is, if the injury was the natural and usual effect, as effect follows cause, of the guardian's negligence, — the defendant cannot be liable. The plaintiff cannot prove that the defendant caused the misfortune; he cannot show that the defendant is, as to him, a wrong-doer. He is the guilty person who negligently suffered the child to get into the danger; and *quære*, if such person, when not the child's parent or guardian, might not be liable to the child?

If, however, in such a case the parent's fault did not in the proper sense contribute to the injury, the defendant should be liable for his negligence. The parent or guardian could recover for an

injury done to *himself* under such circumstances, by all of the authorities; the mere fact of the negligence of the injured man is nothing, unless it was in the legal sense contributory to the accident. *A fortiori*, then, should a child of tender years be able to recover in such a case.

The relation of the parent or guardian to the child has in our view nothing to do with the situation, except as affording one of the conditions under which the injury arose; the only question being whether the defendant caused the misfortune.

In the case of a young child, the fact that it was in a dangerous place will doubtless raise a presumption that the guardian was guilty of negligence, since it is hardly conceivable that the child should have found its way there had there not been a neglect of due care over it. And the question then will be whether that neglect resulted, in the natural sequence of effect following cause, in the injury. If it did, the defendant's negligence did not cause the injury, and the defendant is not liable; if it did not, the reverse is true, and the child is entitled to recover.

If the parent sue for himself, upon the relation of master and servant, for loss of service, the same principles must apply. If the child be too young to be capable of negligence, the question will be whether the parent's negligence contributed, in the legal sense, to the misfortune; and if the child were capable of negligence, whether *his* negligence or the parent's contributed in law to the injury.

We apprehend that, when properly understood, this is the meaning of the doctrine of imputability. The term is an unfortunate one; but no case in which this point is considered can be

found which is an authority for the position that the term is to be understood in the broad sense that a child can only recover when the parent or guardian was not guilty of negligence towards it. In some cases the decision was made without considering whether the parent's negligence was in the true sense contributory. *Lafayette, &c., R. Co., v. Huffman*, 28 Ind. 287. It is submitted that in this case the demurrer to the complaint should have been overruled. It is not the natural and usual effect of neglecting the custody of a child that it should stray upon the railroad track and get killed. But this point does not appear to have been taken.

In *Waite v. North-eastern Ry. Co., EL, B. & E.* 719, in which a child too young to take care of itself was injured by the defendants through lack of proper care on the part of the person in charge of it; the court, in an action by the child, said: "The jury must be taken to have found that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence, *without which* the accident would not have happened; and that, notwithstanding the negligence of the defendant, if she had acted upon this occasion with ordinary caution and prudence, neither she nor the infant would have suffered. Under such circumstances, had she survived [she was killed by the same accident], *she could not have maintained any action against the company*; and we think that the infant is so identified with her that the action in his name cannot be maintained." The words last italicized show why the child could not recover. The grandmother's negligence was contributory in the proper sense, — that is, it operated as a true cause to

the injury, — else she, had she lived, could have maintained an action. And the facts of the case, as stated by the reporter, show that such was the nature of the grandparent's negligence. She was carelessly crossing the railway track, and was hit by an approaching train.

So, too, in *Mangan v. Atterton*, Law R. 1 Ex. 289, another case in which the defendant was held not liable to a child for negligence, the child's misfortune was the direct and inevitable consequence of his own act; and he was apparently capable of negligence.

The recent case of *Lynch v. Smith*, 104 Mass. 52, is especially in point. It was there held that if the parents of a child were not negligent in permitting him to cross a street alone, and while crossing he was injured by the negligence of another traveller, it is sufficient to entitle him to recover for the injury, if he was using that degree of care of which he was capable, though a less degree than would be required of an adult under like circumstances; and that, even if his parents were negligent in permitting him to cross the street alone, their negligence was *not contributory*, and he might recover if, in crossing, he did no act which prudence would have forbidden, and omitted no act which prudence would have dictated, whatever his physical or intellectual capacity. "It does not necessarily follow," said the court, "because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury. The negligence of the parent in such a case would be

remote. But if the child has not acted as reasonable care adapted to the circumstances of the case would dictate, and the parent has also negligently suffered him to be there, both these facts concurring constitute negligence which directly and immediately contributes to the injury, for which the defendant ought not to be required to make compensation."

It would not be the natural and usual consequence of allowing a child nearly five years old, as was the plaintiff, to cross a street, that it would be run over; and hence, though the jury found the parents guilty of neglecting proper care of him, their negligence was not contributory. But, as to the latter part of the above language of the court, it can hardly be supposed that it was meant that there should be contributory negligence on the part of both parent and child. It is certainly enough that the negligence of either was contributory.

See *Jeffersonville, &c., R. Co. v. Bowen*, 40 Ind. 545. See, further, *Leslie v. Lewiston*, 62 Maine, 468.

On the other hand, it cannot be argued that the child, by being itself free from fault while the defendant was guilty of negligence which resulted in the injury, can always maintain his action, — unless the negligence of the parent and that of the defendant was concurrent and equally the cause of the injury. If, for example, the parent negligently push his child into a pit which the defendant was bound to keep fenced, the latter clearly is not a wrong-doer towards the child, and cannot be liable to him. The child is in no better position than a man who without fault suffers injury from the negligence of several; and we have seen that such a person cannot maintain an action against another for negligence, if between that negligence and the injury there intervened the wrongful act of a third person.

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